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Supreme Court of the United States

OCTOBER TERM, 1951

No. 440

DASHIELL HAMMETT and ALPHAEUS W. HUNTON,
Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES ROTHENBERG
Attorney for Petitioners
25 Broad Street
New York 4, N. Y.

CHARLES HAYDON
Of Counsel for Petitioner Hammett

MARY M. KAUFMAN
Of Counsel for Petitioner Hunton

12 CABB PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

INDEX

PAGE

Opinions Below 1

Statement of the Matter Involved 1

The Testimony 6

Jurisdiction 7

Questions Presented 7

Reasons for Allowing the Writ 8

I. There is no legal sanction for the inquiry in question 9

A. There is no statutory authority for the proceedings in question 10

B. Neither the "All Writs" Section of the Statute nor any inherent power of the Court authorizes the jurisdiction assumed by Judge Ryan 12

C. The inquiry violated the Constitution 16

D. The gathering of evidence to apprehend fugitives is a function delegated exclusively to the executive branch of the Government 17

E. The investigation of crime is a Grand Jury function and not a Court function 20

II. The decision below represents a departure from basic principles of constitutional and federal law established by decisions of this Court 23

The Questions Asked Were Incriminating ... 23

PAGE

The Production of the Books and Records was Privileged Under the Fourth and Fifth Amendments 26

Questions Relating to Location of Books and Records 33

Questions Relating to the Contents of the Documents 34

The Court was in Error Not Only With Respect to the Identity of the Surety, But Also With Respect to the Obligations of a Surety.. 36

Questions Relating to the Whereabouts of the Fugitives 40

III. Error in the denial of the privilege as to any one of the categories of questions which form the grounds for the judgments requires a reversal of the convictions 40

Conclusion 41

Table of Cases Cited

Aetna Life Insurance Company v. Hayworth, 300 U. S. 227, 240 (1937) 17

Alexander v. U. S., 181 F. 2d 480, cert. denied, 340 U. S. 920 26

Austin-Bagley Corp. v. United States, 279 U. S. 863.. 33

Ballman v. Fagin, 200 U. S. 186 25

Blau v. United States, 345 U. S. 159.....25, 26, 32

Boyd v. United States, 116 U. S. 616..... 28

Brown v. Spohr, 87 App. Div. 522; aff'd 180 N. Y. 201 27

PAGE

Cary v. Curtis, 3 How. 236, 245 16
Central Trust, etc. v. Gaffney, 157 App. Div. 501; aff'd 215 N. Y. 740 27
Christal v. Pol. Comm. of San Francisco, 33 Cal. App. 2d, 564 39
Commonwealth v. International Harvester Co., 148 Ky. 37 33
Counselman v. Hitchcock, 142 U. S. 547 25

Daisart Sportswear, 169 F. 2d 856, 862..... 33
Doran v. U. S., 181 Fed. 2d 439, C. A. 9, cert. denied, 340 U. S. 290..... 26
Drury v. Hurley, 402 Ill. 243..... 39

Ellis v. Interstate Commerce Commission, 237 U. S. 434, 445 21
Estes v. Potter, 183 Fed. 2d 865, cert. denied, 340 U. S. 920 26
Ewing v. U. S., 204 F. 241.....35, 36, 39

Fink v. O'Neil, 106 U. S. 272.....10, 11
Fisk, ex parte, 113 U. S. 713..... 23
Fleming v. Northern Georgia Mfg. Co., 33 F. Supp. 1005 33
Fox v. Capital Co., 299 U. S. 105 15
Frisbie v. U. S., 157 U. S. 160 21

Gompers v. Bucks Stove and Range Co., 221 U. S. 418 40

Hale v. Henkel, 201 U. S. 43, 63 21
Hau, In re, 27 F. Supp. 480 33
Hirabayashi v. United States, 320 U. S. 81..... 40
Hoffman v. U. S., 341 U. S. 479 25

Iron Clad Mfg. Co., In re, 201 F. 66..... 33

Joelson v. U. S., 287 F. 106 39

PAGE

Kasinowitz v. U. S., 181 Fed. 2d 632, 649, cert. denied, 340 U. S. 92 26
Ketcham v. Commonwealth (1924), 204 Kent 168, 172-175 22

La Grotta v. U. S., 77 F. (2d) 673, 678 35
Leary v. U. S., 224 U. S. 567 37
Lemon, In re, 15 Cal. App. 2d, 82..... 39

McQuigan v. D. L. & W. R. Co., 129 N. Y. 50 16
Munroe v. U. S., 216 F. 107..... 33
Myers v. United States, 272 U. S. 52, 293 18

Oliver, In re, 333 U. S. 257..... 18, 22

Pinkerton v. United States, 328 U. S. 640, 641, n1.... 40
Pulford v. United States, 155 F. 2d 944, 947..... 33

Rex v. Lord Gordon, 2 Douglas Reports (KB) 590, 593 26
Richardson, Matter of, 247 N. Y. 401, 407..... 18
Riggs v. Johnson County, 6 Wall (73 U. S.) 166.....10, 15
Rogers v. U. S., 340 U. S. 367, 372 38
Rowland, ex parte, 104 U. S. 604..... 23
Russell v. McLellan, 21 Fed. Cas. 12158..... 33

Sawyer, In re, 124 U. S. 200..... 23
Scholl v. Bell, 125 Ky. 750..... 39
Smith v. United States, 337 U. S. 137 .....33, 38
Stack v. Boyle, U. S. decided November 5, 1951 37
Sykes, In re, 23 Fed. Cas. 13707..... 33

U. S. v. American Tobacco Company, 146 F. 557.... 33
United States v. Austin-Bagley Corp., 31 F. 2d 299, 234, certiorari denied 33
U. S. v. Bryan, 339 U. S. 323, 330, 331..... 33

PAGE

U. S. v. Burr, 25 Fed. Cas. No. 14692 25
U. S. v. Cousson, 132 F. 2nd 413 (CA 2) 25
U. S. v. Daisart Sportswear, 169 F. 2d 856, 862 33
United States v. Dennis, et al., 341 U. S. 494 .....1, 14
U. S. v. Flories, 289 U. S. 137 10
U. S. v. Jaeger, 117 F. 2nd 483..... 33
United States v. Pickett, 27 Fed. Cas. 528 (No. 16,043) 35
U. S. v. Plumer, 27 Fed. Cas. No. 16,056.....10, 13, 16
U. S. v. Rosen, 174 F. 2nd 187 (CA 2) 25
U. S. v. Weissman, 111 Fed. 2nd 265.....25, 38
United States v. White, 322 U. S. 694..... 29
United States v. Widen, 38 Fed. 2d 517 15
United States v. Wright, 56 F. Supp. 489, 491, 492....11, 13
U. S. Bank v. Halstead, 10 Wheat, 51..... 15

Wayman v. Southard, 10 Wheat. 1 .....10, 14
Windsor v. McVeigh, 93 U. S. 274 10

Statutes and Authorities Cited

United States Code

18 U. S. C. 739, 799 25
18 U. S. C. 951 25
18 U. S. C. 1542, 1546 25
18 U. S. C. 2381-2387 25
18 U. S. C. 371 25
28 U. S. C. Section 1651..... 12
28 U. S. Code 1254(1) 7
18 U. S. C. 3142 35

PAGE

Federal Rules of Criminal Procedure:

Rule 32(a) 11
Rule 32(b) 11
Rule 32(c) 11
Rule 32(d) 11
Rule 32(e) 11
Rule 33 11
Rule 34 11
Rule 35 11
Rule 36 11
Rule 46(b) 12
Rule 46f(3)(g) 35

Federal Rules of Civil Procedure:

Rule 69(a) 11, 14

Article III, Section 2 of the Constitution 17

Bacon's Discourse on the Commission of Bridewell, 6 Works 514 23

California Committee on Un-American Activities, Report 47 24

Chafee, Freedom of Speech, p. 298, et seq. 21

Forsyth, Trial by Jury (1875), 184, 185 22

Harboring Act (18 U. S. C. 1071, 1072) 24

House Document 137, 82nd Congress, First Session [1951] 24

Internal Security Act of 1950, Pub. 831, 82nd Congress 25

Lord Coke, The Commissions of Enquiry, 1608, 12 Rep. 31 22

PAGE

May, The Constitutional History of England, (1880), ch. XI, p. 245, et seq. 21

"Power to Regulate Contempts," 37 Harvard Law Review 17

Star Chamber (Act pro Camera Stellata, 3 Hen. VII, c. 1 (1487) 21n

Treatise on Discovery (c. 5, Sec. 3, p. 84, ed. 1876).... 15

1 Cooley, Constitutional Limitations, ch. X, p. 612, n. 1 21

1 Hallam's Const. Hist. of Eng. 69 ..... 21n

1 Story on the Constitution (5th Ed. 1891), Secs. 1901, 1902 21

12 R. C. L. 1013, 1038 22

MISCELLANEOUS

Letters of Attorney General dated November 24, 1947; May 27, 1948; April 21, 1949; July 20, 1949; September 26, 1949; August 24, 1950 and September 5, 1950, pursuant to Executive Order No. 9, Report No. 1115, September 2, 1947, of House Committee on Un-American Activities 24

Testimony before Special Committee of House Committee on Appropriations, January 12, 1950 24

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No. .....

DASHIELL HAMMETT and ALPHAEUS W. HUNTON,
Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Dashiell Hammett and W. Alphaeus Hunton pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit, made October 30, 1951, which affirmed orders of the United States District Court for the Southern District of New York entered July 9, 1951 (80-90)* adjudging petitioners guilty of contempt of court and sentencing each of them to imprisonment for six months.

Opinions Below

The three judges who heard the petitioners' appeal to the Court of Appeals concurred in the result. Judge Frank dissented in part and wrote an opinion. These opinions have not yet been reported, but appear as an appendix to the record.

Statement of the Matter Involved

Several days after this Court upheld the conviction of eleven defendants in the case of *United States* v. *Dennis*,

* All references are to folios in the printed transcript of record on appeal.

et al., 341 U. S. 494, the United States Attorney for the Southern District of New York sent telegrams to each of the eleven defendants directing them to surrender on July 2, 1951, and at the same time sent a similar telegram to Robert W. Dunn, the surety on their bail bonds (96, 97, Exhibit 1). Seven of the defendants appeared and were incarcerated. Four failed to appear. Dunn was ill in the hospital and unable to appear (187).

Judge Ryan immediately issued bench warrants for the four who were missing (94) and, when they failed to appear on the following day, declared their bail forfeited.

At the request of the United States Attorney, Judge Sylvester J. Ryan issued subpoenas requiring the appearance of the bondsman, Robert W. Dunn, and the appearance of Abner Green, Frederick V. Field and the petitioners (97, 100, 101).

Green and Field learned of the issuance of the subpoenas through the press and voluntarily appeared within a few hours. Hunton and Hammett heard or read the news out of town and appeared shortly thereafter (103, 424, 524).

When Field and Green appeared in the courtroom, Judge Ryan ordered Field to the witness stand and directed the United States Attorney to

> "* * * proceed to examine this witness and ascertain what knowledge he has, if any, concerning the present whereabouts of these defendants (Winston, Hall, Thompson & Green, the defendants in the Dennis case who failed to appear) * * * (109).
>
> "* * * you may ask him such questions as you desire which will throw light upon the present or past whereabouts of these defendants who are named fugitives * * *" (109, 113).

Judge Ryan stated the purpose of the inquiry to be as follows:

"The Court is conducting a hearing to determine what if anything is being done by anybody to assist these four men in evading the process of the Court and to discover such information as may be able to give to those who have been entrusted with the execution of the warrants which are outstanding for these four men and to assist them in effecting service of that process of the Court. That, I believe, is in the inherent power of the Court.

"The Court is also conducting an inquiry to determine whether or not the conduct of any individual in connection with the non-appearance of these men and when they were required to appear after their release on bail has been contumacious of the Court and whether anybody is in contempt of the Court as a result of any action they might have taken in any aid or assistance or advice they may have given any of these four men in evading the process of the Court and in committing what I deem to be a contemptuous action.

"Mr. Rabinowitz: [Attorney for Field] Well, I assume then that I will have an opportunity later to address myself to the question of the jurisdiction of the Court.

"The Court: Yes. Now, at the present time, I issued subpoenas for four or five individuals who executed the bonds in these cases. One of these individuals, it has been stated to the Court, is ill and confined to a sanitarium. I so direct that he be not required to appear at this time, because I have no purpose to inter-

fere with the medical care and attention that individual at present is said to be receiving.

"Your position here, counsel, briefly stated, as I see it, is that you do not appear as a party to these proceedings, these present proceedings, and you will not appear as a party to these present proceedings until such time as I begin to determine whether or not this man or these witnesses who have testified are to be held in contempt. * * *"

When counsel sought to determine the legal basis for the inquiry, there occurred the following colloquy:

"The Court: The court is proceeding under the section of the Code that deals with contempts, under the Rules of Criminal Procedure, Rule 42.

"Mr. Rabinowitz: That is the rule under which you are proceeding to hold the witness in contempt. I am inquiring as to the rule under which he was called here in the first place.

"The Court: The court is proceeding under the inherent power of the court to make inquiry into any action which the court deems is calculated to be in contempt of court and which the court deems is a flouting of the court's jurisdiction. * * * The court is also proceeding under the inherent power of any court to conduct an inquiry which will assist in effecting service or process issued by the court." (262, 263).

Judge Ryan directed all exhibits to be treated as Court, and not government exhibits (492).

The only bondsman or surety who executed the bonds which released the four defendants pending their appeal was Robert W. Dunn.

Neither the petitioners nor Field nor Green had signed any bond or recognizance for the appearance of these defendants.

When Judge Ryan undertook his inquiry, the United States Attorney placed before him the four bail bonds signed by the four defendants in question as principal, and by Robert W. Dunn as surety. At the time of posting the bail, Dunn delivered the U. S. Government bearer bonds in the amount of the required bail. The United States Attorney also produced certain documents filed by Dunn when the bonds were given. These consisted of a copy of an "Agreement and Deed of Trust" dated originally September 16, 1946 and amended September 26, 1949, which showed that Field, Green, Hammett, Hunton and Dunn, therein designated as trustees, were accepting loans and gifts—for which certificates of deposit or receipts were to be given—to be employed in posting bail "for the benefit of strikes and all those whose civil rights are threatened or under attack". There was also a statement by Field, Dunn and Hunton, dated November 3, 1949, reciting that they authorized the use of the Government bearer bonds by Robert W. Dunn as collateral security for bail for the persons indicted under the Smith Act.

The bond posted by Dunn in the case of each of the defendants provided (Exhibit 1):

> "Now, the conditions of these recognizances are such that if the said (defendant) shall appear either in person or by attorney in the United States Court of Appeals for the Second Circuit, when such case is reached for argument or when required by law or rule of said United States Court of Appeals and from day to day thereafter in said United States Court of Appeals, until said case is finally disposed of, and shall

abide by and obey all orders made in said case, and shall surrender himself in execution of the judgment sentence appealed from upon such day as the District Court of the United States for the Southern District of New York may direct, if the judgment and sentence appealed from shall be affirmed, and shall appear before the District Court of the United States for the Southern District of New York on such day or days as shall be for a re-trial of the said case, provided the judgment of the District Court of the United States for the Southern District of New York is reversed by the said United States Court of Appeals; and shall not depart the jurisdiction of the District Court of the United States for the Southern District of New York without leave, then this recognizance to be void, otherwise, to remain in full force, virtue and effect.

"And we, the undersigned principal and surety, do hereby STIPULATE, AGREE AND CONSENT, that in case the aforesaid recognizance shall be forfeited, judgment may be entered from the sum set forth in said recognizance and that execution issue thereon according to law."

We respectfully repeat that neither one of the petitioners signed any of these bonds, and it is important to bear the fact in mind since both Judge Ryan and the Appeals Court proceeded on the assumption that the petitioners were "persons who executed the bonds in these cases."

The Testimony

Petitioner Hunton testified that he was a trustee of the bail fund of the Civil Rights Congress; that he did not have in his possession any books, records or documents per-

taining to the bail fund of the Civil Rights Congress (432, 499, 593); that he did not know where such books and records were; that he did not know where any of the fugitives were and had done nothing in any way to aid or abet in their non-appearance or conspire with any one for their concealment or non-appearance in Court (439); and that he had not seen any of the defendants any time after the affirmance of their convictions by this Court (605). He declined to answer questions concerning the operations of the bail fund on the ground of the privilege against self-incrimination.

Petitioner Hammett declined to answer questions concerning his relationship to the bail fund; his knowledge of the defendants, or the contents or whereabout of the books of the bail fund of the Civil Rights Congress, on the ground of the privilege against self-incrimination (527, et seq).

The Judge overruled the plea of self-incrimination and directed them to answer all questions and to produce the books and records of the bail fund of Civil Rights Congress. Upon their failure to comply with these directions, he found them guilty of contempt of Court and sentenced each of them to six months confinement.

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1951. The jurisdiction of this Court is invoked under 28 U. S. Code 1254 (1).

Questions Presented

1. Whether Judge Ryan had constitutional or statutory authority to conduct the inquiry or investigation here in question and to adjudge the petitioners guilty of contempt.

2. Whether petitioners had the right to refuse the production of the books and papers called for by the Judge on the ground that the production of such books and records was subject to a claim of privilege under the self-incrimination clause of the Fifth Amendment.

3. Whether petitioners had the right to refuse to answer the questions put in the inquiry or investigation on the ground that such questions were likewise subject to a claim of privilege under the self-incrimination clause of the Fifth Amendment.

4. Whether petitioners' rights to claim their privilege under the Fifth Amendment were either waived or contracted away by the testimony given by them or by the filing by anyone else of documents in the District Court in connection with the bail in the case of *U. S.* v. *Dennis.*

5. Whether a single sentence for contempt, based upon several categories of acts, should be reversed if it should appear that the finding of contempt with respect to any one of those categories was error either in law or in fact.

Reasons for Allowing the Writ

The pressures and tensions of the times have borne heavily on constitutional rights and privileges, never before questioned. Too frequently are such rights lightly treated in the lower Courts.

The issues on this appeal present questions of constitutional and federal law of profound importance to a bewildered and worried public. They should be settled by this Court. The decision of the Court of Appeals conflicts

with constitutional principles, and the Court of Appeals has so far sanctioned a departure by Judge Ryan from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I

There is no legal sanction for the inquiry in question.

The investigation conducted by Judge Ryan is unprecedented in the history of American jurisprudence. Never before has a Judge conducted an inquiry for the purpose of obtaining evidence as to the whereabouts of convicted defendants who failed to appear for commitment. Never before has a Judge, under threat of contempt, compelled persons to appear before him and testify, under oath, and produce their books and papers in furtherance of such an inquiry.

His inquiry was neither authorized by law nor recognized in practice. There were no named or specified parties. There was no defined or definable area of materiality or relevancy of evidence. There was no privilege of counsel, or opportunity to object to immaterial matter by any one. There were only so called "witnesses" who were required to answer questions and produce records, and upon their failure so to do, they were adjudged guilty of contempt of Court and sent to jail.

The scope of the inquiry was limited solely by the grace of the Judge who conducted it.

This Court's review of the jurisdiction assumed by Judge Ryan is sought in the interests of preserving the basic principles of our government, the vital separation of power between its branches, the due process of law and the funda-

mental liberties guaranteed in our Constitution and, at the same time, preventing the abuse and usurpation, by courts of limited jurisdiction, of powers and functions vested in the executive and administrative bodies of our government.

A. There is no statutory authority for the proceedings in question.

Federal District Courts are neither common law courts, nor courts existing by prescription. Their jurisdiction derives only from the Constitution and the Statutes of the United States (*U. S.* v. *Flories,* 289 U. S. 137).

In *Windsor* v. *McVeigh,* 93 U. S. 274, this Court said, at page 282:

> "All courts (federal), even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief such as legal or equitable; or to transactions of a special character * * *; or to the use of particular process in the enforcement of their judgment. * * * Though the court may possess jurisdiction of a cause, the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot transcend the power conferred by law."

The procedures of a District Court subsequent to judgment in a criminal case require and must have clear and unequivocal statutory authority. (*Wayman* v. *Southard,* 10 Wheat. 1; *Fink* v. *O'Neil,* 106 U. S. 272; *Riggs* v. *Johnson County,* 6 Wall (73 U. S.) 166; *U. S.* v. *Plumer,* 27 Fed. Cas. No. 16,056.)

The only statutory powers vested in a District Court subsequent to such judgment are the following: as to sentence (Federal Rules of Criminal Procedure, Rule 32(a)); as to the form of the judgment (Rule 32(b)); as to pre-sentence investigation (Rule 32(c)); as to the withdrawal of a plea of guilty and setting aside the judgment of conviction (Rule 32(d)); as to the placing of a defendant on probation (Rule 32(e)); as to granting a new trial (Rule 33); as to arresting judgment (Rule 34); as to correcting or reducing a sentence (Rule 35); and as to correcting clerical errors (Rule 36).

In *Fink* v. *O'Neil,* 106 U. S. 272, a civil case, this Court said at page 280:

> "The United States cannot enforce the collection of a debt from an unwilling debtor, except by judicial process. They must bring a suit and obtain a judgment. To reap the fruit of the judgment they must cause an execution to issue. The courts have no inherent authority to take any one of these steps except as it may have been conferred by the legislative department, for they can exercise no jurisdiction except as the law confers and limits it."

It is important to note that Congress did provide the District Court with jurisdiction to entertain proceedings to enforce its judgments in civil suits (Federal Rules of Civil Procedure, Rule 69(a)). But there is no statutory authority in a criminal case for the enforcement of a bench warrant or the execution of its judgment by any such means or in such manner or to such extent as was here undertaken by Judge Ryan.

In *United States* v. *Wright,* 56 F. Supp. 489, 491, 492, the Court said:

> "• • • nor was it any part of the court's function to execute the sentences. That duty was in the marshal and the prison authorities. • • •
>
> "The trial court has jurisdiction only to try cases, to enter sentences and to direct their enforcement, the apprehension of the defendant upon commitment and his imprisonment are matters solely within the duties of other officers of the Department of Justice."

Congress was not unmindful of the possibility that convicted defendants at large on bail might fail to appear for commitment. Rule 46(b) of the Federal Rules of Criminal Procedure gives the Court jurisdiction to declare a forfeiture of bail in such cases.

In view of the foregoing, the absence of a specific statute dealing with the power of a court to take testimony to effectuate the service of a bench warrant in a criminal case indicates Congressional intent to deny that power to the federal courts.

B. Neither the "All Writs" Section of the Statute nor any inherent power of the Court authorizes the jurisdiction assumed by Judge Ryan.

The Court below was of the opinion that Judge Ryan's jurisdiction might be upheld either under (a) the authority of 28 U. S. C. Section 1651, the "All Writs" Section, or (b) the inherent power of the Court to "do all things that are reasonably necessary for the administration of justice, within the scope of their jurisdiction."

Section 1651 provides that Federal Courts

> "• • • may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

But the procedure Judge Ryan followed was neither in aid of jurisdiction, nor agreeable to the usages and principles of law. It is settled law that Section 1651 provides no new jurisdiction for the Courts, but

> "• • • merely makes available to the District Courts all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, but it does not confer or expand the jurisdiction." (*Shimola* v. *Local Board No. 42, Cuyahoga County,* 40 F. Supp. 808; see also *Whitney* v. *Dick,* 202 U. S. 136; *Price* v. *Johnson,* 334 U. S. 266.)

In *U. S.* v. *Wright, supra,* the Court held that the Trial Court's jurisdiction in a criminal case terminated on the entering of sentence and the direction for its enforcement.

In *U. S.* v. *Plumer,* 27 Fed. Cas. No. 16,056, defendant was found guilty of murder, sentenced to be executed and remanded to custody awaiting the execution of sentence. The question before the Court was whether the "all writs" section authorized a Federal Court to grant a writ of error from the judgment of conviction rendered by the same Court. The Court said:

> "Unless the writ is necessary to the exercise of jurisdiction already vested in the circuit court, the power to issue the writ cannot be deduced from that clause (the 'All Writs' Section); but the uniform construction given the provision is that Congress intended to vest the power to issue such 'other writs', in cases where jurisdiction already existed, and not where the jurisdiction was to be acquired. *M'Clung* v. *Silliman,* 6 Wheat. (19 U. S.) 601; *McIntire* v. *Wood,* 7 Cranch (11 U. S.) 506; *Kendal* v. *U. S.,* 12 Pet. (37 U. S.) 624.
>
> "Completed as the proceedings in the case were, the Circuit Court, at the date of this application, has no

> more power over it than if the indictment had never been found." (574)

Here, no case or proceeding was pending before the Court when Judge Ryan called the petitioners to the witness stand. The case of *United States* v. *Dennis,* et al., had been completed for all judicial purposes. Seven of the eleven defendants had been incarcerated. Bench warrants had been issued for the missing defendants, and their bail had been forfeited.

The case of *Wayman* v. *Southard* (10 Wheat. 1), cited by the Court below, was a civil suit. It has no application here, because there the continuing jurisdiction until satisfaction of judgment was predicated upon historic writs and statutory procedures in aid of execution exercised in civil cases.

In *Wayman* v. *Southard* the Court clearly limited its decision to the authority of the Court to issue a Writ of Execution and declared that the "all writs"

> "• • • section provides singly for issuing the writ and prescribes no rule for the conduct of the officer while obeying the writ."

While the issuance of the bench warrant in a criminal proceeding may be analogous to the writ in a civil case and authorized under the "all writs" section, the cited case is no authority for Judge Ryan's action under review. Even in a civil case, the "all writs" section was never deemed to authorize the taking of evidence in aid of the execution or the enforcement of the judgment. In all cases where such ancillary proceedings have been upheld, the courts relied upon specific statutory authority, now codified in Rule 69(a) of the Federal Rules of Civil Procedure.

Furthermore, the writ authorized by the "all writs" section must be "agreeable to the usages and principles of law". (*Riggs* v. *Johnson,* 6 Wall (73 U. S.) 166; *U. S. Bank* v. *Halstead,* 10 Wheat. 51) and this Court has uniformly held that that phrase was intended to embody existing process at the time of the passage of the Judiciary Act and subsequent legislation affecting the forms and procedures of the Federal Courts.

In *Riggs* v. *Johnson,* the Court said at pages 189, 190;

> "Executions it is admitted may be issued by the circuit court, but the power of such courts to issue all other writs necessary to the exercise of jurisdiction is equally clear, with the single restriction that the writ, and the mode of process, must be agreeable to the principles and usages of law. Usages of law and not the common law, it will be observed, are the words of the provision, which doubtless refers to principles and usages of law as known and understood in the state courts at the date of that enactment."

The procedure undertaken by Judge Ryan has never before been exercised or used in a criminal case by any court of law in American jurisprudence.

Mr. Hare, in his Treatise on Discovery (c. 5, Sec. 3, p. 84, ed. 1876) points out that discovery in civil suits after trial was not allowed prior to the statutory authority except as a creditor's suit in equity.

Supplementary proceedings in aid of execution are a substitute for such suit. (*Fox* v. *Capital Co.,* 299 U. S. 105.) Federal criminal courts have no equitable jurisdiction. (*United States* v. *Widen,* 38 Fed. 2d 517.)

Judge Ryan had no inherent power to conduct the inquiry. Federal Courts are not possessed of powers inherent

in Courts existing by prescription or common law. (*Cary* v. *Curtis,* 3 How. 236, 245.)

Inherent powers of a court are derived from immemorial usage. (*McQuigan* v. *D. L. & W. R. Co.,* 129 N. Y. 50.) There is no precedent for Judge Ryan's inquiry or procedure. In *U. S.* v. *Plumer,* 27 Fed. Cas., No. 16,056, this Court said at page 572:

> "Seventy years having elapsed, or nearly so, since our judicial system was organized, the conclusion would seem to be a reasonable one that if there is any foundation for the right claimed to be exercised in this case, some trace of a prior exercise of it, or of a claim of exercise of it in a criminal case, would be found in some supported decision of the circuit or district courts.
>
> " * * * (p. 574) the construction attempted to be given to the clause referred to ('all writs' section) is as unwarranted by its language as it is unsupported by the usages and practices of the circuit courts."

In *McQuigan* v. *D. L. & W. R. Co., supra,* at page 56, the Court said:

> "It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until a very recent period, never in fact had any existence."

C. The inquiry violated the Constitution.

A judicial proceeding is one in which the Court is required to declare the law, discover the facts and adjudicate the rights of litigants.

Under Article III, Section 2 of the Constitution, judicial power extends only to *cases* and *controversies.*

> "To exercise judicial power there must be parties to the controversy, an assertion and a denial; in short, a distinct issue to be determined." (Cooley, *Constitutional Limitation,* 132) see also: *Pacific Railway Commission* v. *Stamford,* 32 Fed. Rep. 241; and *Interstate Commerce Commission* v. *Brinson,* 154 U. S. 447.

In *Aetna Life Insurance Company* v. *Hayworth,* 300 U. S. 227, 240 (1937), the Court ruled the Declaratory Judgment Act constitutional, but only to the extent that "it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial powers extend. It must be a real * * * controversy admitting of specific relief through a decree of conclusive character."

"Judicial power," was described by Justice Frankfurter in *"Power to Regulate Contempts,"* 37 Harvard Law Review 1017 in these words:

> "These limiting conceptions [imposed by the Constitution] may be thus defined: (1) It is the characteristic of the courts to decide and not merely to advise. Their work must be definitive and not consultative. They are an independent organization of government with finality of judgment within their domain and not advisory adjuncts of the executive or legislature. (*Gordon* v. *U. S.,* 117 U. S. 697 (1964).)"

D. The gathering of evidence to apprehend fugitives is a function delegated exclusivly to the executive branch of the Government.

The inquiry conducted by Judge Ryan constituted an invasion of the functions delegated by the Constitution

solely to the executive branch of the Government. The doctrine of the separation of powers into the legislative, executive and judicial branches of the Government, separate and distinct, is rooted in our system of jurisprudence.

Under this system, the Courts must obviously rely upon other departments of government to aid in the administration and enforcement of justice. Appropriately, the entire burden of the proper function of the administration of justice does not rest upon the Court alone.

"The doctrine of the separation of powers", said Mr. Justice Brandeis, dissenting in *Myers* v. *United States,* 272 U. S. 52, 293, "was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power".

An inquiry by courts dedicated to the uncovering of clues leading to the apprehension of criminals and their incarceration has been condemned time and again, rarely with more clarity than by Chief Judge Cardozo of the New York Court of Appeals in *Matter of Richardson,* 247 N. Y. 401, 407 (cited with approval in *In Re Oliver,* 333 U. S. 257). In that case, the New York State Legislature passed a law which charged Justices of the Supreme Court with the duty of acting as a delegate of the Governor in investigating the acts of a public officer. The Court held the statute unconstitutional and said (410-412):

> "The question arose as far back as 1792. An act of Congress required the Circuit Courts of the United States to examine into the pension claims of soldiers and seamen of the Revolution, and to certify their opinion to the Secretary of War with a view to corrective legislation. The judges of the several circuits concurred in a determination that the duty was

not judicial Hayburn's Case, 2 Dall. 409. In 1851 the Supreme Court of the United States considered that determination and approved it, declining jurisdiction under an act not widely different U. S. v. Ferreira, 13 How. (U. S.) 40, 44. There was an opinion by TANEY, C. J., which has become a landmark of the law Gordon v. U. S., 117 U. S. 697; Matter of Sanborn, 148 U. W. 222; Int. Com. Comm. v. Brimson, 154 U. S. 447, 481; Muskrat v. U. S. 219 U. S. 346, 353; Tutun v. U. S., 270 U. S. 568, 576; Liberty Warehouse v. Grannis, 273 U. S. 70, 74. Nowhere has the doctrine thus established been applied more steadily or forcefully than in the courts of New York. Matter of Davies, 168 N. Y. 89; Matter of State Ind. Comm., *supra*. The function of the judges is to determine controversies between litigants. Matter of State of State Industrial Comm. *supra*. They are not adjuncts or advisers, much less investigating instrumentalities, or other agencies of government. Their pronouncements are not subject to review by Governor or Legislature Dinan v. Swig, 223 Mass. 516. They speak 'the rule or sentence.'

"The statute was thus an encroachment upon the independence of judicial power even in the form in which it stood until recently amended. Still more clearly is it such an encroachment in its form as now reframed. The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within his breast to be with-

> held or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this court."

The opinion of Judge Cardozo might have been written for the case at bar. Judge Ryan had his counsel, assistant counsel and experts. He sought to follow trails of suspicion to uncover hidden wrongs, to build up a case as a prosecutor builds one. He did no more than the United States Attorney would have done.

The outstanding fact remains that it was an inquiry which could lead to no rule or sentence.

E. The investigation of crime is a Grand Jury function and not a Court function.

Another one of the declared purposes of the inquiry, was to investigate whether anybody assisted the defendants in the *Dennis* case to become fugitives (199-203). There was no limitation upon the scope of the inquiry or the number of persons to be called, nor was the inquiry directed the issuance of any order or determination. The only possible conclusion to the proceeding would be the gathering and development of information.

The inquiry may fairly be described in the words of Mr. Justice Holmes as a "fishing expedition * * * for the

chance that something discreditable might turn up" (*Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, 445), and a general investigation or inquisition is to be condemned on the same common-law and constitutional grounds as were general warrants and wide roving inquisitions by Royal Commissions of Enquiry, the Courts of High Commission and Star Chamber. (See May, *The Constitutional History of England,* (1880), ch. XI, p. 245, et seq.; 1 Cooley, *Constitutional Limitations,* ch. X, p. 612, n. 1; 1 *Story on the Constitution* (5th Ed. 1891), Secs. 1901, 1902; Chafee, *Freedom of Speech,* p. 298, et seq.)

In *Hale* v. *Henkel,* 201 U. S. 43, 63, the Court quoted the following from *Frisbie* v. *U. S.,* 157 U. S. 160:

> "But in this country it * * * is for the Grand Jury to investigate any alleged crime * * *."
>
> "The proceedings before a Grand Jury constitute the only general criminal investigation known to the law." (*Ward Baking Co.* v. *Western Union Telegraph Co.,* 205 App. Div. 727, 729.)*

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* The statute which had established the notorious Star Chamber (Act Pro Camera Stellata, 3 Hen. VII, c. 1 (1487)) provided for a general inquiry and represented an heroic method to cure a breakdown in the adminsitration of justice (1 Hallam's Const. Hist. of Eng. 69). But the remedy proved worse than the disease. The Star Chamber, with its general inquiries into indefinitely alleged offenses, had assumed an arbitrary character, and the abuses were many. The statute which abolished the Star Chamber (16 Chas. I, ch 10) graphically recited the abuses, as had other ancient sources. In the Mirror of Justices, whose date is uncertain, we find the following (Selden Soc. Ed.):

> "56. It is an abuse to make a man answer to the King's suit when he is not indicted or appealed.
>
> "64. It is an abuse to suffer judges to be plaintiffs for the King.
>
> "71. It is an abuse that a plaint should be received and heard when there are no suitors presented to testify that the plaint is true.
>
> "98. It is an abuse to summon a man without giving him reasonable notice of the matter about which he is to answer."

In *In re Oliver,* 333 U. S. 257, Justice Rutledge, concurring with the majority which found that the defendant had been adjudged guilty of a contempt of court without due process, said (278, 279):

> "Michigan's one-man grand jury as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petty jury. This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections, secured by the Sixth Amendment, namely, the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel for his defense. * * *
>
> "This aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common-law at the time our institutions crystallized in the Constitution. They are altogether at variance with our tradition and system of government, they cannot stand the test of constitutionality for purposes of depriving any person of life, liberty or property."

Judge Ryan's inquiry is an episode reminiscent of the ancient struggle between judges and grand juries. The grand jury system "took from the judges and other agents of the Crown the authority to inquire into and present all infamous offenses and those accused thereon." (*Ketcham* v. *Commonwealth* (1924), 204 Kent 168, 172-175. See also 12 R. C. L. 1013, 1038; Forsyth, *Trial by Jury* (1875), 184, 185. See also: Lord Coke, *The Commissions of Enquiry,*

1608, 12 Rep. 31; Bacon's *Discourse on the Commission of Bridewell,* 6 Works 514.)

These appellants have a standing to question the jurisdiction of the Court which deprived them of their constitutional liberties. The rule is clear and settled that orders made by a Court having no jurisdiction to make them may be disregarded without liability to process for contempt. (*In re Sawyer,* 124 U. S. 200; *Ex parte Fisk,* 113 U. S. 713; *Ex parte Rowland,* 104 U. S. 604.)

As this Court has often said and repeated in *In re Sawyer, supra*:

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void [citing cases]."

II

The decision below represents a departure from basic principles of constitutional and federal law established by decisions of this Court.

The Questions Asked Were Incriminating

The questions which the petitioners failed to answer fell into four distinct categories:—questions relating to production of their books and records; questions relating to the whereabouts of the fugitives; questions which sought to locate and identify the books and records; and questions as to what the books and records would reveal, more par-

ticularly, the names of the lenders and donors to the Bail Fund of the Civil Rights Congress.

The four fugitives were all members of the National Executive Committee of the Communist Party. The Civil Rights Congress, under whose sponsorship the Bail Fund was set up, has on numerous occasions been described as a "subversive" organization, as a "front" for the Communist Party and as part of a nationwide Communist conspiracy. Such charges have been given wide circulation, not merely by the newspapers, but by the Attorney General of the United States, Congressional committees and other investigating committees (Letters of Attorney General dated November 24, 1947; May 27, 1948; April 21, 1949; July 20, 1949; September 26, 1949; August 24, 1950 and September 5, 1950, pursuant to Executive Order No. 9, Report No. 1115, September 2, 1947, of House Committee on Un-American Activities; California Committee on Un-American Activities, Report 47; House Document 137, 82nd Congress, First Session [1951]).

Several months prior to the inquiry, Assistant Attorney General Whearoty stated that widespread prosecutions would be started under the Smith Act against thousands of "alleged" subversives. (Testimony before Special Committee of House Committee on Appropriations, January 12, 1950.)

Disclosure of knowledge as to whereabouts of the fugitives obviously might involve the petitioners in a violation of the Harboring Act (18 U. S. C. 1071, 1072) or conspiracy to violate the same.

The fear of prosecution was further heightened by Judge Ryan's statement that he was also investigating a possible contempt of Court in assisting or aiding the fugitives (200).

Evidence of association with the fugitives or with any so-called "front" organizations might easily, in these times of widespread use of conspiracy charges, involve the petitioners in charges of violation or conspiracy to violate espionage laws, sedition laws and laws respecting registration of foreign agents, etc.*

The petitioners were privileged to withhold testimony which not only might directly implicate them in a crime, but which might furnish a clue to their commission of a crime or a link in evidence which might tend to establish their guilt. The mere possibility that a response would supply such a clue or link sustains an assertion of the privilege (*Hoffman* v. *U. S.*, 341 U. S. 479; *Blau* v. *United States*, 345 U. S. 159; *Ballman v. Fagin*, 200 U. S. 186; *Counselman* v. *Hitchcock*, 142 U. S. 547; *U. S.* v. *Burr*, 25 Fed. Cas. No. 14692; *U. S.* v. *Weissman*, 111 Fed. 2nd 265; *U. S.* v. *Cousson*, 132 F. 2nd 413 (CA 2) and *U. S.* v. *Rosen*, 174 F. 2nd 187 (CA 2).

In *Hoffman* v. *U. S.*, 341 U. S. 479, this Court said (487-488):

> "• • • If the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responding answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

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* 18 U. S. C. 739, 799; 18 U. S. C. 951; 18 U. S. C. 1542, 1546; 18 U. S. C. 2381-2387; 18 U. S. C. 371; Internal Security Act of 1950, Pub. 831, 82nd Congress.

The foregoing principles have been applied from time immemorial to cases involving association with persons or groups who might be deemed subversive. In the very early case of *Rex* v. *Lord Gordon,* 2 Douglas Reports (KB) 590, 593, the report says:

> "A witness being asked, on the cross-examination, if he was a *Roman* Catholic, the question was objected to; and the court ruled that he was not obliged to answer it because if he were to say he was, his declaration would be evidence against him and might subject him to penalties."

As recently as *Blau* v. *U. S.,* 340 U. S. 159, this Court held answers to questions concerning affiliation or association with the Communist Party or its members are privileged. The same obviously applies to organizations deemed subversive or Communist fronts. (*Alexander* v. *U. S.,* 181 F. 2d 480, Cert. denied, 340 U. S. 920; *Kasinowitz* v. *U. S.,* 181 Fed. 2d 632, 649, Cert. denied, 340 U. S. 92; *Doran* v. *U. S.,* 181 Fed. 2d 439, C. A. 9, Cert. denied, 340 U. S. 290; *Estes* v. *Potter,* 183 Fed. 2d 865, Cert. denied, 340 U. S. 920.)

The Production of the Books and Records was Privileged Under the Fourth and Fifth Amendments

The Civil Rights Congress of New York, concerned with the protection of the rights of labor and of all civil liberties, sponsored the idea that there was need for a fund which was to be available for use as bail in cases involving the defense or protection of these rights.

Five citizens, Robert W. Dunn, Frederick V. Field, Abner Green, W. Alphaeus Hunton and Dashiell Hammett, calling themselves Trustees, signed an "Agreement and Deed of

Trust'' by which they agreed to receive gifts and loans of money or securities, without interest, of which they were to have sole and exclusive control and which they would make available for use as security by sureties on bail bonds in such cases.

They were not chartered by any governmental body or agency. They were not required to be so chartered, nor were they required to file any certificate to authorize them to act for the indicated purposes. They were not a corporate body, nor did they constitute an organization or association of any kind.

There were no statutory or administrative rules or regulations to which they were subject, and they were not representing any person or persons other than themselves.

When they signed the ''Agreement and Deed of Trust'', there was no ''trust res'' in being and no trust recognized by law (*Brown* v. *Spohr,* 87 App. Div. 522; aff'd 180 N. Y. 201; *Central Trust,* etc. v. *Gaffney,* 157 App. Div. 501; aff'd 215 N. Y. 740).

There were no principals and no members. They were not elected, appointed or chosen by any person or group of persons. They reported to no one. They acted for no stockholders, no members, and had no obligations except that of debtor with relation to those who loaned them money. They engaged in no business or trade or profession and did not, nor were they required to, keep or make any reports or accountings.

They were not required to keep books or records for or on behalf of anyone, except only for themselves, as they made their own rules and regulations for the operation of the Bail Fund. Nobody had a right of access to any books or records which they may have chosen to keep, and these

books and records were purely personal and not impersonal.

The Bail Fund had no personality aside from that of the Trustees, and their sole activity was confined to the single function of providing funds to sureties on bail bonds in cases which they, in their own judgment, deemed to be in defense of the rights of labor or of civil liberties.

In *Boyd* v. *United States,* 116 U. S. 616, this Court said (pp. 631-632):

> "[A]ny compulsory discovery by extorting the party's oath * * * to convict him of crime, or to forfeit his property, is contrary to the principles of a free government * * * [I]t is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In that case (transcript of record, Supreme Court of the United States, October Term, 1885, No. 983), Edward A. Boyd & Sons, a firm, had an agreement with the United States Government under which it was to supply glass and was permitted to import, duty-free, such amount of glass as it supplied.

The firm obtained a letter from the Government permitting 26 cases of glass to be imported duty-free. The United States Attorney for the Southern District of New York then began a proceeding *in rem* to declare these 26 cases of glass contraband on the ground that they were being imported under a false statement.

The firm denied the charge and filed a claim for the glass.

The United States Attorney then obtained an order, for use upon the trial, requiring Edward A. Boyd & Sons to produce the invoice sent to them by their shipper in England. The original invoice was not available and they agreed to produce, and did produce, a duplicate which was admitted into evidence over their objection.

This Court held that the introduction into evidence of the invoice violated the constitutional and statutory rights of the constituent members of Boyd & Sons under the Fourth and Fifth Amendments, saying:

> " * * * that the inspection by the District Attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the Court, were erroneous and unconstitutional proceedings."

In the examination of these petitioners, no testimony was adduced or produced to show that either of them kept or had any books or records concerning the Bail Fund, either in their possession or under their control. In no sense was possession, control or custodianship of such books and records established. Insofar as there was any reference to such documents, it came from sources with which these petitioners were not confronted, and which they could neither examine nor cross-examine.

The holding in the *Boyd* case directly controls the situation here presented, and the case of *United States* v. *White*, 322 U. S. 694, referred to in the Court below, has no application to the case at bar.

In the *White* case, a subpoena *duces tecum* was served upon an officer of a labor union, requiring the production of the union's books and records before a Grand Jury. Upon the return date, White appeared with the books. He testified that he was the "Assistant Supervisor" of

the union and that he had the required documents in his possession. He refused to produce them, however, upon the ground that they might tend to incriminate his union or himself, either as an officer or as an individual. In affirming the holding that White had no such privilege, and was guilty of contempt, this Court traced the development of labor unions as legal entities, structurally and functionally possessed of and endowed with the attributes of a legal and impersonal institution recognized in statute and practice. The Court said:

> "Structurally and functionally, a labor union is an institution which involves more than the private or personal interest of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union. The union's existence in fact, and for some purposes in law, is as perpetual as that of any corporation, not being dependent upon the life of any member. It normally operates under its own constitution, rules and by-laws which, in controversies between member and union, are often enforced by the courts. The union engages in a multitude of business and other official concerted acitvities, none of which can be said to be the private undertakings of the members. Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do; nor have they authority to act for the members in matters affecting only the individual rights of such members. The union owns separate real and personal property, even though the title may nominally be in the names of its members or trustees. The official union books and records of the individuals, in the same

manner as the union treasury exists apart from the private and personal funds of the members. See *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 534. And no member or officer has the right to use them for criminal purposes or for his purely private affairs. The actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question. At the same time, the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts. See *Lawlor* v. *Loewe*, 235 U. S. 522; *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275."

The Court took into consideration all of the statutes, practices and rules concerning labor organization and the public necessity for having reasonable regulations of their activities, and, even then, limited its holding in the case, saying (p. 698):

> "Our attention is directed solely to the right of an officer of a union to claim the privilege against self-incrimination under the circumstances here presented."

There is no resemblance between the circumstances in the *White* case and this case. Any similarity is more superficial than real.

The *White* case neither overruled nor diminished the holding of the *Boyd* case. In fact, Justice Murphy clearly and emphatically gave new vigor to the principles of the *Boyd* case when he cited it as an example of private and personal papers protected by the privilege of the Fifth Amendment (322 U. S. 694, 699).

Any extension of the doctrine of the *White* case to the case at bar would be a repudiation of the concern this Court expressed

> "* * * to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them (Fourth or Fifth Amendments) by imperceptible practices of courts or by well-intentioned but mistakenly overzealous executive officers" (*Gouled* v. *United States,* 255 U. S. 298, 304).

With respect to petitioner Hammett, there is still another distinction between his situation and the *White* case. He refused to testify as to any association with the Bail Fund.

In the case of *Blau* v. *United States,* 340 U. S. 159, the appellant was protected from answering questions as to her relationship to the Communist Party and also as to the whereabouts of its books and records.

Unlike the present situation, in all cases cited by Justice Murphy in the opinion in the *White* case, the custodianship of the desired records was admitted by the witness. Neither of the petitioners made such admission in this case. In fact, Hunton testified he did not know where they were.

The very basis of the *Boyd* and *Blau* cases is that the privilege against self-incrimination extends not only to the contents of the books, but to the very act of producing them. This is in line with the doctrine that the Constitution protects not merely those who refuse to give oral testimony, but embraces as well the furnishing, by any other means, of evidence which the accused has a right to hold secret. (28 *R. C. L.,* para. 20, p. 434.)

In any event, no person may be punished for contempt of Court for refusing to produce books and records which are neither in his possession nor under his control. (*U. S.*

v. *Bryan,* 339 U. S. 323, 330, 331; *U. S.* v. *American Tobacco Company,* 146 F. 557; *U. S.* v. *Jaeger,* 117 F. 2nd 483; *Fleming* v. *Northern Georgia Mfg. Co.,* 33 F. Supp. 1005; *Munroe* v. *U. S.* 216 F. 107; *In Re Sykes,* 23 Fed. Cas. 13707; *In Re Iron Clad Mfg. Co.,* 201 F. 66; *Russell* v. *McLellan,* 21 Fed. Cas. 12158; *In Re Hau,* 27 F. Supp. 480; *Commonwealth* v. *International Harvester Co.,* 148 Ky. 37.)

Questions Relating to Location of Books and Records

The Court below held that these questions were not privileged because they were "auxiliary to the production" of the book and records. Since the Court erred with respect to the applicability of the *White* case, it erred with respect to these questions also.

Independently of the Court's errors with respect to the *White* case, it erred when it held these were "auxiliary" questions. The only questions which have ever been held "auxiliary" and not subject to the privilege are those which concern themselves with authentication of books *already* produced. *United States* v. *Austin-Bagley Corp.,* 31 F. 2d 299, 234, certiorari denied *Austin-Bagley Corp.* v. *United States,* 279 U. S. 863; *Pulford* v. *United States,* 155 F. 2d 944, 947.

Judge Clark, who wrote the majority opinion in the case at bar which found these questions "auxiliary" and cited the *Austin-Bagley* case, took a very different view of that case in *U. S.* v. *Daisart Sportswear,* 169 F. 2d 856, 862, reversed on other grounds, *Smith* v. *United States,* 337 U. S. 137. He discussed the *Austin-Bagley* case, found it standing for the proposition only that a corporate officer may be forced to testify to the genuineness of corporate books and refused to extend its holding beyond that principle.

The distinction between authentication and location is real and substantial. Questions relating to the location of books and records assume their existence, knowledge of them, a certain amount of control over them, and their continued existence at the time of the questioning. Such questions not only lead to an association which is privileged, but at the same time might reveal facts which are incriminating in themselves.

Judge Clark, in his opinion in the *Daisart* case (*supra*) ruled against this very type of question and said (p. 862):

> "* * * (T)he very matter that would incriminate had to be forced from the lips of the defendant himself, rather than obtained from the records or books."

Questions Relating to the Contents of the Documents

The majority of the Court of Appeals took the position that these questions, and also questions concerning the whereabouts of the fugitives, were privileged. However, they held, as Judge Frank pointed out in his opinion:

> "The defendants bargained away the privilege many months before any judicial inquiry arose, when they voluntarily became sureties and thereby impliedly promised to disclose to the government any information which may aid in bringing into custody the convicted persons for whom the defendants (petitioners) had gone bail."

It is obvious—and important to consider—that the Court of Appeals proceeded on the erroneous assumption that these petitioners were "sureties" and "had gone bail". The fact is that the petitioners were not sureties, did not sign the recognizances, were not the bondsmen, and had

entered into no relationship or agreement with the Court, either in law or fact.

The only surety or bondsmen was Robert W. Dunn. When he appeared to post bail and presented the Federal Government Bearer Bonds, he was asked to justify under Rule 46e of the Federal Rules of Criminal Procedure. He then produced a copy of the "Agreement and Deed of Trust" and the affidavit.

Petitioners were not requested to and did not justify as sureties. They executed no recognizance. They assumed no obligations and received no attendant rights. They were not the "surety" who has the power to arrest a party admitted to bail (18 U. S. C. Sec. 3142). They did not appoint the clerk their agent for accepting service of papers. They needed, and could receive, no exoneration (Fed. Rules Crim. Proc., Rule 46f (3), g).

In *La Grotta* v. *U. S.*, 77 F. (2d) 673, 678, the Court said:

> "A bail bond is a contract between the government, on the one side, and the principal and surety on the other. United States v. Zarafanitis, et al., 150 F. 97, 80 C. C. A. 51 [10 Am. Cas. 290]; Kirk v. United States (C. C.), 131 F. 331. Like other contracts, it must be construed according to its express terms * * *."

Such contracts are always strictly construed (*Ewing* v. *U. S.*, 204 F. 241).

The "express terms" of the bonds in this case designate Robert W. Dunn as surety—and the only surety.

In *United States* v. *Pickett*, 27 Fed. Cas. 528 (No. 16,043), Pickett the accused, and Williamson, as surety,

executed a recognizance for Pickett's appearance. Some days later, Harding also signed the document; his name was not inserted in the body of the instrument. Upon Pickett's failure to appear, the Government sought to collect the bail from Harding. The Court denied the application and said:

> "It is clear that the recognizance entered into by Pickett and Williamson on the 9th of September, and certified by the justice, was a perfect and valid instrument. * * * Harding's name does not appear on the recognizance as one of the parties making the acknowledgment; and he is not otherwise connected with it than by the fact that he appeared on a subsequent date and put his name to it * * * without his name in the body of the instrument, his signature to the recognizance, at a subsequent day, did not make him a party to it, and thereby create a joint and several liability with the other parties * * *."

No one may be held to be a bondsman unless he executes a bond, and the bond he executes creates and limits the obligations he undertakes (*Ewing* v. *U. S.*, 204 F. 241). These petitioners executed no recognizance and undertook no obligations.

As far as the petitioners are concerned, it is clear that the proceedings against them present a case of confused or mistaken identity.

The Court was in Error Not Only With Respect to the Identity of the Surety, But Also With Respect to the Obligations of a Surety

We respectfully submit that the Court of Appeals was not only in error in treating petitioners as sureties on the

bonds in question, but was also in error as to the nature of the obligations undertaken by an actual surety.

We treat this point because it was injected into the proceedings by Judge Ryan and accepted as a pertinent question by the Court of Appeals.

In *Leary* v. *U. S.*, 224 U. S. 567, Mr. Justice Holmes said:

> "It is said that the bail contemplated by the Revised Statutes (Section 1014, U. S. Comp. Stat. 1901, p. 716) is common-law bail, and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the *mundiam,* although a trace of the old relation remains in the right to arrest. Rev. Stat., Sec. 1018. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for $40,000, that sum was the measure of the interest on anybody's part, and it did not matter to the Government what person ultimately felt the loss, so long as it had the obligation it was content to take."

In *Stack* v. *Boyle,* U. S. decided November 5, 1951, Chief Justice Vinson said:

> "Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture, serves as additional assurance of the presence of an accused * * *
>
> "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon

> standards relevant to the purposes of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant."

The sole authority for dealing with bail upon the non-appearance of defendants is found in Rule 46 of the Federal Rules of Criminal Procedure.

> "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable same escapes because it provided a procedure for dealing with them. Fed. Rules Crim. Proc. 46(f)" (Jackson, *J.*, concurring, *Stack* v. *Boyle, supra*).

Neither Rule 46, nor any other rule or decision, authorizes the calling of the person who may have supplied the surety with the money or the property he may have posted as bail. Nor do they provide for a "contract" to waive the privileges of the Fifth Amendment.

Waiver of the privilege against self-incrimination is an intentional act (*Smith* v. *United States,* 337 U. S. 137; *U. S.* v. *Weissman,* 111 F. 2d 265). The privilege does not exist unless there is a "real danger" to the witness (*Rogers* v. *U. S.,* 340 U. S. 367, 372). There can be no intelligent and conscious waiver of the constitutional privilege by acts in 1946 and 1948 as to a "real danger" which did not come into being until the *Dennis* case fugitives failed to appear in 1951.

In the case at bar, the surety's contract was satisfied. The recognizance contained no covenant to waive the privilege, for himself or any one else. There is no authority,

in history, statute or case, for the proposition that a contracting party may be examined to determine his ability to perform a contract already fulfilled.

Even a policeman who undertakes the contractual obligation to uphold the law has been held to be able to assert the privilege in an investigation of his conduct (*Christal* v. *Pol. Comm. of San Francisco,* 33 Cal. App. 2d, 564; *In Re Lemon,* 15 Cal. App. 2d, 82; *Drury* v. *Hurley,* 402 Ill. 243; *Scholl* v. *Bell,* 125 Ky. 750).

The surety in this case undertook only one obligation: to forfeit the bonds if the defendants failed to appear. The judge forfeited the bonds; he paid the penalty for the failure to appear; and he could not be held or charged with any further liability for breach of contract (*Ewing* v. *U. S.,* 204 F. 241; *Joelson* v. *U. S.,* 287 F. 106).

The rule with respect to the object of bail and the obligations of the surety has been concisely stated in 6 *American Jurisprudence* 112:

> "The object of requiring bail and the principal obligation thereof, is to secure the appearance of the accused so as to be present to answer the call of the court, submit to the prosecution of the charges that have been made against him, to do what the law may require of him. If this is done, the requirements of the bond have been answered. However, under modern rules, a surety on a bail bond or recognizance in a criminal case is regarded as a mere guarantor of the accused's appearance under risk of forfeiture of the penalty of the bond; a money security alone is contemplated, no legal duty to produce the accused being expressly laid upon the surety by instruction of the court, or by oath or otherwise."

Questions Relating to the Whereabouts of the Fugitives

The considerations expressed with respect to questions dealt with in the next preceding category apply to this category with equal force.

III

Error in the denial of the privilege as to any one of the categories of questions which form the grounds for the judgments requires a reversal of the convictions.

Where a conviction for several counts of contempt is reviewed, if the judge imposed only one sentence and any one of the grounds is found to be erroneous, the judgment must be reversed.

This differs from the rule in criminal cases which are founded upon several counts of an indictment or information (*Pinkerton* v. *United States,* 328 U. S. 640, 641, n1; *Hirabayashi* v. *United States,* 320 U. S. 81). In those cases, if one of the good grounds is sufficient to support the sentence, the sentence will not be disturbed.

The rule for contempt cases and applicable here was expressed by this Court in *Gompers* v. *Bucks Stove and Range Co.,* 221 U. S. 418. The Court of Appeals in that case had reviewed a judgment of contempt involving nine different grounds. It found the contemnors guilty of at least one of the acts and sustained the judgment on analagy to the rule in criminal cases. This Court said (p. 440):

> "That rule (of criminal cases) originated in cases where the finding of guilt was by the jury while the sentence was by the judge. In such cases the presumption is that the judge ignored the finding of the jury on the bad counts and sentenced only on those which were sufficient to sustain the conviction * * *

"Having found that each was guilty of these separate acts (of contempt) he (the trial judge) consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that having found them guilty of these nine specific acts he did not impose same punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction."

Judge Frank found error on Judge Ryan's part with respect to two of the categories of questions. But he overlooked the principle expressed in the *Gompers* case, and the majority of the Court said that the answer to the question presented by such a situation was not overclear.

CONCLUSION

The Writ of Certiorari should be issued and the judgment below reversed.

Respectfully submitted,

CHARLES ROTHENBERG
Attorney for Petitioners
25 Broad Street
New York 4, N. Y.

CHARLES HAYDON
Of Counsel for Petitioner Hammett

MARY M. KAUFMAN
Of Counsel for Petitioner Hunton

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

FREDERICK V. FIELD,

Petitioner,

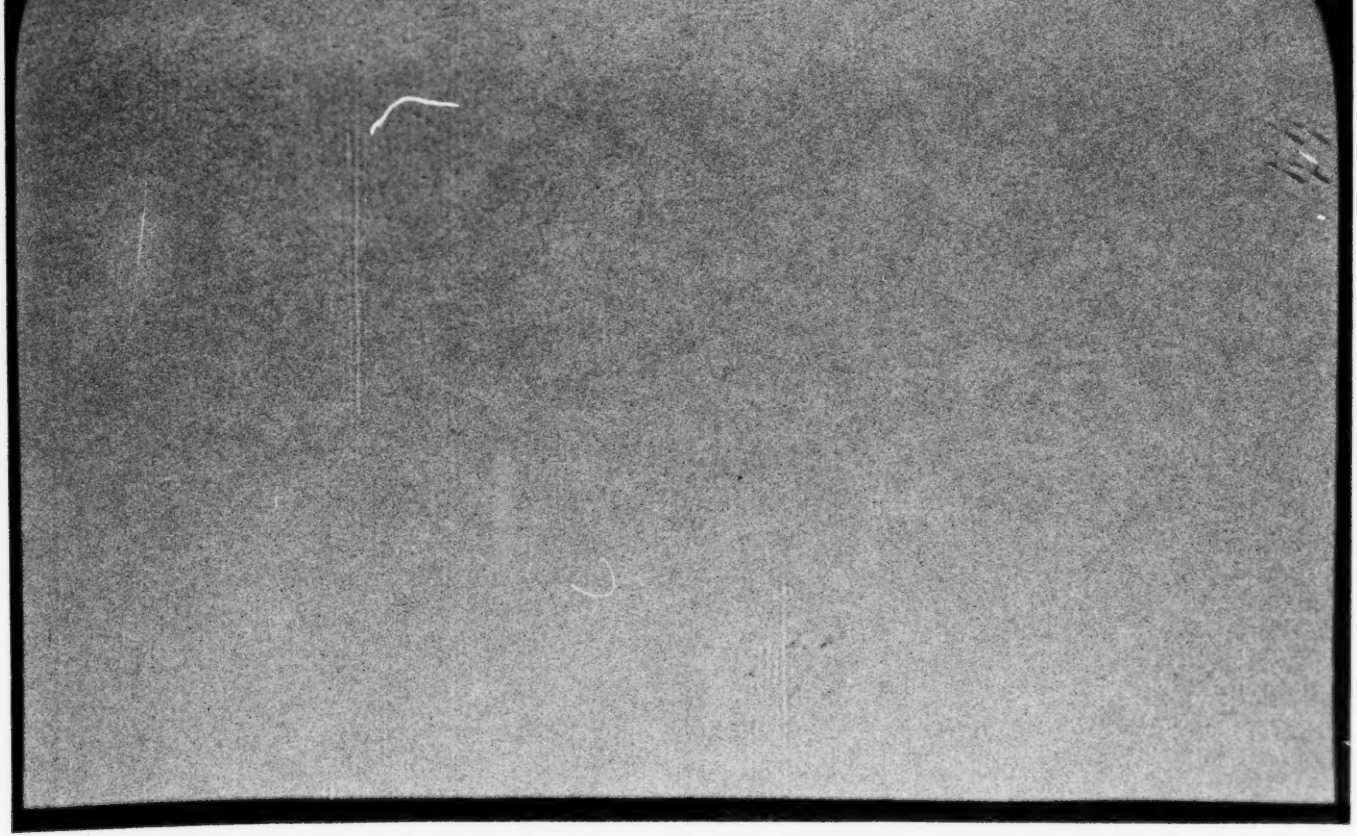
v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Victor Rabinowitz,
Attorney for Petitioner,
76 Beaver Street,
New York 5, New York.

Dated: November 19, 1951.



INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	2
The Decision of the Court Below	6
I	8
II	11
III	18
IV	22
V	25
Conclusion	26
Appendix A	27

CASES

Blau v. U. S., 340 U. S. 159	22
Bowles v. Beatrice Creamery, 146 F. 2d 774	15
Boyd v. U. S., 116 U. S. 616	13, 19
Brown v. U. S., 276 U. S. 134	15
Entick v. Carrington, 19 How. St. Tr. 1029	13
Federal Trade Commission v. American Tobacco Co., 264 U. S. 298	14
Fleming v. Montgomery Ward, 114 F. 2d 384, cert. den. 311 U. S. 690	15, 16
Gompers v. Buck's Store & R. Co., 221 U. S. 418	25
Hale v. Henkel, 201 U. S. 43	13, 16, 19

PAGE

Hammett v. U. S., petition for writ pending 10

Hunton v. U. S., petition for writ pending 10

Leary v. U. S., 224 U. S. 567 9

Oklahoma Press Pb. Co. v. Walling, 327 U. S. 186 15

Pulford v. U. S., 155 F. 2d 944 18

Rogers v. U. S., 340 U. S. 367 ..... 22, 24

Shapiro v. U. S., 335 U. S. 1 10

Smith v. U. S., 337 U. S. 137 ..... 10, 23

Stack v. Boyle, ... U. S. ....., October Term, 1951 9

U. S. v. Austin-Bagley Corp., 31 F. 2d 229 18

U. S. v. Daisart Sportswear, 169 F. 2d 862 10

U. S. v. Dennis, 341 U. S. 494 ..... 3, 7, 10

U. S. v. Field, Hunton & Hammett, ... F. 2d 3, 6

U. S. v. Medical Society, 26 F. Supp. 55 15

U. S. v. St. Pierre, 132 F. 2d 837 20

U. S. v. White, 322 U. S. 694 ..... 6, 7, 18, 19, 22

Wilson v. U. S., 221 U. S. 361 ..... 19, 20, 21, 22

STATUTES

United States Code, Title 18, Sec. 1254(1) 1

United States Constitution:

First Amendment 21
Fourth Amendment 2, 5, 6, 7, 8, 11, 13, 16, 17, 18, 19
Fifth Amendment 2, 4, 5, 7, 8, 11, 18, 19, 20, 21, 22, 25

AUTHORITIES

Lasson, N. B.: The History & Development of the Fourth Amendment to the United States Constitution 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

FREDERICK V. FIELD,
Petitioner,
v.
UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Frederick V. Field, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, affirming petitioner's conviction in the District Court for the Southern District of New York for contempt of court.

Opinions Below

No opinion was handed down by the District Court. The opinion of the Court of Appeals was handed down on October 30, 1951, and has not yet been officially reported. It appears in the record at page 118a.

Jurisdiction

The judgment of affirmance by the Court of Appeals was entered on October 30, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether petitioner wilfully and contemptuously refused to obey a valid order of the District Court directing him to answer certain questions relating to the Bail Fund of the Civil Rights Congress of New York before a Grand Jury in the Southern District of New York.

2. Whether petitioner wilfully and contemptuously refused to obey a valid order of the District Court directing him to produce certain books and records of the Bail Fund of the Civil Rights Congress of New York before a Grand Jury in the Southern District of New York.

Statutes Involved

The Fifth Amendment to the Constitution of the United States reads, so far as pertinent:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The Fourth Amendment to the Constitution of the United States reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement

On July 30, 1951, Honorable John F. X. McGohey, a judge of the United States District Court for the Southern District of New York, found and adjudged petitioner "guilty of contempt of court in refusing to produce certain books and records and to answer certain questions relating

to the Bail Fund of the Civil Rights Congress of New York before a Grand Jury in the Southern District of New York," and sentenced him to imprisonment for 6 months, or until he sooner purges himself (11).* Petitioner appealed this judgment to the Court of Appeals, which affirmed on October 30, 1951, one judge dissenting in part.

This proceeding arises out of an investigation conducted by a Federal Grand Jury sitting in the Southern District of New York inquiring into the disappearance of four fugitives who had been convicted of conspiring to violate certain provisions of the Smith Act (*United States* v. *Dennis*, 341 U. S. 494), looking toward their apprehension, and inquiring further as to whether there were, in connection with the said disappearances, any violations of the criminal laws of the United States (21, 28).

The said four fugitives had been indicted and convicted together with seven other defendants. The bail for all eleven had been posted in 1949 with funds supplied by the Bail Fund of the Civil Rights Congress of New York (hereinafter sometimes referred to as the Bail Fund) (21, 22). As a result of the failure of four of the said defendants to surrender after affirmance of their conviction by this Court, the bail posted on their behalf was ordered forfeited in the aggregate sum of $80,000, on July 3, 1951. Beginning on that day and until July 9, 1951, the Hon. Sylvester J. Ryan conducted a hearing, in the course of which the Court called as a witness, among others, the petitioner herein. Petitioner declined to answer certain of the questions put to him by the Court, asserting his privilege against self-incrimination as his reason therefor. He was adjudged to be in contempt of court and a sentence of 90 days was imposed. *United States* v. *Field, Hunton & Hammett*, ... F. 2d .....; see appendix hereto. That sentence has been fully served and is not involved in this appeal.

Shortly after imposition of the sentence by Judge Ryan, the Grand Jury investigation, out of which this proceeding

* All references are to folios in the printed record.

arises, was commenced. Petitioner was called as a witness before the Grand Jury on five separate occasions (28, 29, 271 ff.). He was asked numerous questions pertaining to his connection or association with the Bail Fund; his activities in connection therewith; the control of its funds; the method of operation of the Fund; his acquaintance with various named individuals; whether, if he were asked to produce the records of the Bail Fund he would comply; and various related questions pertaining to the nature and operation of the Bail Fund and his connection therewith (48, 62-64, 67-77, 134, 152-157). Petitioner asserted his rights under the Fifth Amendment to the Constitution of the United States and declined to answer any questions of the type above referred to on the ground that the answers thereto might tend to incriminate him (48, 62-64, 67-77, 134, 152-157).*

On July 24, 1951, petitioner was brought before the Court by the United States Attorney, who sought a direction from the Court as to certain questions (173-175). After argument that Court ruled "* * * the privilege you [petitioner] claim was, in the first place, not claimed in good faith and, secondly, the privilege that is claimed does not exist" (247). He directed petitioner "to return before the Grand Jury and answer the questions with respect to the books and records and other matters concerning this Bail Fund concerning which you have refused to answer questions" (247). The Court further directed that the witness answer questions relating to "the other trustees, how the Fund was handled, what the records were, where they were kept, who had them, who attended meetings with respect to them * * *" (251).

Thereafter, and on the afternoon of the same day, petitioner was recalled as a witness before the Grand Jury. At

* On one of his appearances petitioner did answer a series of questions relating to certain action taken by the Bail Fund in retaining counsel (137-139). The Court of Appeals relied upon these answers, which will be discussed more fully below, as constituting an admission of trusteeship and custodianship of the books and records of the Fund.

that time the Foreman demanded that he produce "the books and records of the Bail Fund of the Civil Rights Congress of New York, for the years 1946 to 1951 inclusive." He was also asked "countless questions" concerning, among other things, the operations of the Bail Fund, its employees, and his relationship to it. Petitioner declined to answer these questions or to produce the books and records, on the ground that to do so might incriminate him (38, 39).

The petitioner was thereupon ordered to show cause why he should not be held in contempt of court and punished therefor "by reason of the fact that he wilfully and contemptuously did refuse to produce before a grand jury in the Southern District of New York certain books and records of the Bail Fund * * * and by reason of the further fact that the said Frederick V. Field wilfully and contemptuously did refuse to answer certain questions relating to the Bail Fund * * * " (14-16).

On the return date, there was further argument before Judge McGohey (295-341). Counsel for the petitioner urged that the refusal of the witness to answer questions was based on his privilege under the Fifth Amendment, and that his refusal to produce the books was protected by both the Fourth and Fifth Amendments. In the latter connection counsel particularly objected to the breadth of the demand for the books and records of the Bail Fund. It was noted that the demand was for all of the books and papers of the Fund since the date the Bail Fund came into existence, and that no facts had been presented showing the relevance of the evidence sought. Counsel argued that the demand was hence unreasonable and within the prohibition of the Fourth Amendment (298-312).

The United States Attorney failed and refused to make any specification whatsoever as to the nature of the books he required. The only statement made with respect to their relevancy was one appearing in the affidavit of the United States Attorney to the effect that the failure of the petitioner to produce the books and records "is frustrating

the Grand Jury's investigation. It is absolutely necessary that the aforesaid books and records be produced immediately and that the full details relating to the operation of the Bail Fund itself be disclosed" (41).

The Court found the petitioner guilty of contempt and sentenced him to 6 months, that sentence to commence at the conclusion of the term he was then serving under the sentence imposed by Judge Ryan (336-337).

The Decision of the Court Below

The Court of Appeals affirmed the judgment of conviction but divided on some of the issues presented. It considered separately (1) the right of petitioner to refuse to answer questions pertaining to the Bail Fund, his connection therewith, the contents of its books and records, the method of its operation, his acquaintance with various named individuals, and other related questions, and (2) the right of petitioner to refuse to produce the books and records of the Fund, and to answer questions "auxiliary thereto." The latter question was in turn broken down into three aspects:

(a) Is the principle enunciated in *United States* v. *White,* 322 U. S. 694, applicable here?

(b) Had petitioner admitted custodianship of the Fund's books and records so as to preclude any claim of privilege available to him relative to their production?

(c) Was the blanket demand for books and records in violation of the Fourth Amendment as an unlawful search and seizure?

The holdings of the Court of Appeals on these issues may be summarized briefly as follows:*

* The Court of Appeals, in its decision concerning petitioner Field's right to plead the privilege in response to questions other than those pertaining to production of books and records, incorporated by reference its decision of that day in the companion case of *United States* v. *Field, Hammett and Hunton,* 2d Cir., ... Fed. 2d ..... For the convenience of this Court, we are reprinting that opinion of the Court below in full, in an Appendix to this petition.

The majority of the Court of Appeals held, in substance, that petitioner was one of the sureties for the defendants in *United States* v. *Dennis, supra,* and as such constituted their jailer and was thus responsible for their appearance; that the nature of this obligation required him to answer all questions concerning the Bail Fund, the whereabouts of the defendants and/or his connection with them; that, in effect, the posting of bail constitutes a contract by a surety not to claim the privilege against self-incrimination under the Fifth Amendment in response to such inquiries, and thus that the privilege was unavailing to petitioner Field in the instant case. Judge Frank vigorously dissented from this conclusion which he contended was without precedent, violative of constitutional rights and seriously whittled away at basic civil liberties.

Concerning the production of books and records, the Court below held that the principle set forth in *United States* v. *White, supra,* was applicable to associations in the nature of the Bail Fund; that certain of petitioner's testimony, more fully discussed below (see pp. 22-24, infra), constituted an admission of trusteeship, and hence the claim of privilege was unavailable to him in response to a demand to produce books and records and in answer to questions "auxiliary" thereto.

The Court further held that the blanket demand for all the books and records of the Bail Fund since its inception did not constitute an unlawful search and seizure in violation of the Fourth Amendment, by virtue of the "nature of the inquiry" here conducted.

It may readily be seen that the case at hand presents many serious questions of constitutional law, as to a major portion of which the Judges below disagreed.

We shall deal initially and but briefly with the questions of law involved in petitioner's refusal to answer questions other than those pertaining to the production of books and records, not because the issues are of minor importance, but, on the contrary, because the substantial nature of the questions raised was so clearly recognized by the Court

below and is so well presented in the separate opinion of Judge Frank that elaborate treatment seems unnecessary.

On the questions presented by petitioner's refusal to produce books and records, more extensive discussion seems warranted. For the Court below, by the very cursory way in which it treated the question, indicated its complete failure to recognize the serious constitutional issues presented as well as the grave public policy considerations involved. Yet, in our opinion, the decision of the lower Court in this respect is not only erroneous but must have far reaching consequences, in that at a most critical time in our history it virtually destroys the protections of the Fourth and Fifth Amendments.

I

The substantial nature of the issue concerning petitioner's right to plead privilege in response to inquiries other than those "auxiliary" to the production of books, is made more than manifest by a reading of majority and dissenting opinions of the Court below. Indeed, as to certain aspects of this problem, Judge Frank so effectively sets forth our views, that it seems hardly necessary to do more than to refer to his words.

Petitioner was asked to testify orally, as Judge Frank notes, to "questions which—so my colleagues concede—(1) would tend to self-incrimination, (2) were not at all 'auxiliary' to the production of the records, and (3) would ordinarily be covered by the anti-self-incrimination constitutional privilege. * * * " He then continues to set forth his understanding of the holding of the majority of the Court concerning petitioner's rights with respect to such questions as follows:

> "My colleagues' position as to those questions is this: The defendants [petitioner herein] bargained away the privilege many months before any judicial inquiry arose, when they voluntarily became sureties and

thereby impliedly promised to disclose to the government any information which might aid in bringing into custody the convicted persons for whom the defendants [petitioner herein] had gone bail."

Judge Frank then sets forth his contrary view of the applicable law as follows:

"But I do not accept my colleagues' thesis that a court may criminally punish a man who breaks such a contract by which he agrees, long in advance, to surrender his anti-self-incrimination privilege. In short, I think that no such advance (pre-inquiry) contract can validly destroy the privilege (not to give oral self-incriminating testimony) when asserted by a witness in response to questions during a proceeding, if that privilege would otherwise apply.

"No case relating to bail sureties, or other persons, has been cited by my colleagues in support of their position. Nothing in any of the previous decisions relative to this Bail Fund bears on the subject. My colleagues' ruling is a startling innovation; it marks the deepest inroad on the privilege to this date."

We should like to note that while we agree with the conclusion reached by Judge Frank on the question of privilege, we respectfully differ with his assumption that a surety agrees, by the mere fact of posting bail, to answer the questions of the type put to petitioner here. We submit, rather, that the obligation of the surety is fully met by the posting of bond and the forfeiture of the same upon defendant's failure to appear. The theory that a surety is a jailer of the defendant and responsible for his appearance has long been discarded by this Court. See *Stack* v. *Boyle,* decided by this Court November 5, 1951; *Leary* v. *United States,* 224 U. S. 567.

Thus, the posting of a bail bond now takes the place of the oath required in earlier years. Hence, the sole agreement or contract entered into by the surety was that, in the event the accused did not appear, the surety would forfeit his bond. He did not agree to answer all questions which

the government feels might aid in bringing into custody the convicted person.

This question is raised and dealt with in the companion cases of *Hunton* v. *United States* and *Hammett* v. *United States* (as to which petitions are being filed simultaneously herewith), and hence will not be discussed here at any length. Rather, the Court is referred to the discussion in that case. However, even assuming that such a contractual obligation to testify does exist, nevertheless, we feel the law to be quite clear that the petitioner still had the right to plead his privilege (as found by Judge Frank) and thus the decision of the Court below on this point was error.

The decision of the majority of the Court below on this aspect of the case is even more startling when applied to the instant case than when applied to the *Hunton* and *Hammett* cases. For in the latter cases, the Court held that the proceeding before Judge Ryan was a part of the *Dennis* case in which petitioner posted bond. The instant case admittedly is a completely new and separate proceeding. Hence, the ruling of the majority is that the right of a surety to claim the privilege as to any question pertaining to the bail fund, his connection with it, or the whereabouts of or his relation to persons for whom he posted bail is *forever* lost, and may not be pleaded in *any* subsequent proceedings of any kind.

We respectfully submit that, as pointed out by Judge Frank, *none* of the cases relied upon by the majority of the Court below sustains its ruling on this question. *Shapiro* v. *United States,* 335 U. S. 1, dealt with production of books and the Court there noted "Of course all *oral* testimony can properly be compelled only by exchange of immunity for waiver of privilege." (Emphasis in original.) There was no immunity granted here.

The distinction was reaffirmed in *United States* v. *Daisart Sportswear,* 2 Cir., 169 F. 2d 862, reversed on other grounds, *Smith* v. *United States,* 337 U. S. 137.

Likewise in each of the State court cases relied on by the majority, those courts were careful to point out that the

statutes involved made no attempt to compel oral testimony in the face of a plea of privilege.

As Judge Frank aptly pointed out, "my colleagues do not cite, and I have been unable to discover, a single American case deciding that a statute can validly abolish the privilege with respect to giving oral testimony. Moreover, in the instant case, no statute required the defendants to report or make disclosures. Their obligation to disclose is wholly contractual, deriving by implication from their contract as sureties. No American case has been cited, and I can find none, to the effect that, by any advance contractual promise the privilege can be abrogated. All the pertinent decisions hold the other way." He further comments that in his opinion any such contract, even were it specific beyond question, would be contrary to public policy. As our courts have held, many important rights or privileges may not be validly contracted away in advance. "Advance abandonment is forbidden to prevent the right being thoughtlessly foregone." As Judge Frank says, if such bartering away is permitted in this case, it could hardly be prevented elsewhere, and "before long, rubber stamped out of existence, the privilege [against self-incrimination] will be but a quaint item of antiquarian lore."

II

While Judge Frank was most acutely aware of the serious blow dealt certain of our Fifth Amendment liberties by the decision of the Court below, yet we respectfully urge that he completely failed to recognize the equally serious challenge which the decision represents to those rights guaranteed by the Fourth Amendment. For the demand for books and papers here made was so broad and all-encompassing that it constituted an unlawful search and seizure.

Petitioner was directed by the Grand Jury to produce "the books and records of the Bail Fund of the Civil Rights

Congress of New York for the years 1948-1951 inclusive" (38, 39); *i.e., all* of the books and records of the Bail Fund since the date of its organization.* Although, during the course of argument, counsel for the petitioner asked for a particularization of the broad demand and asked the United States Attorney to make some showing of relevancy, the latter steadfastly declined to even suggest the same or to further specify in any way the nature of the books or records demanded.

The only statement of relevancy by the government, prior to conviction, was that contained in the moving papers, namely, "Failure of Frederick V. Field to produce the books and records of the Bail Fund of the Civil Rights Congress, or to give any information with regard to the Bail Fund of the Civil Rights Congress, or the location of the books and records, is frustrating the Grand Jury's investigation. It is absolutely necessary that the aforesaid books and records be produced immediately, and that the full details relating to the operation of the Bail Fund itself be disclosed" (41). Not until briefs were submitted to the Court of Appeals was any other argument addressed to relevancy of the demand. Even that argument, however, could not justify the broad demand made and at any rate was clearly too late. And at *no* time was any effort made to particularize in any way the books and records demanded.

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* The record also raises serious question as to whether the District Court ever ordered petitioner to produce the books and records. The only directions by the Court appear at fols. 247, 251 and 253. It will be noted that the Court directed only that questions relating to the books and papers be answered. Indeed, in its brief to the Court of Appeals, the Government conceded that the "cold record" did not show any specific direction to produce. The Court of Appeals disposed of this matter by stating that counsel for Field seemed to understand that the Judge's direction, referred to above, called for the production of books and papers. It is respectfully submitted that a conviction for contempt of court cannot be sustained on the basis of something that does not appear in the "cold record" or on the strength of the understanding of counsel rather than the witness. To sustain such a conviction, the order of the Court must be clear and explicit.

Now, such a broad and all-encompassing demand has, since the birth of this Republic, been condemned—both by the document creating the nation and the court decisions protecting its basic liberties. The Fourth Amendment to the Constitution of the United Sates provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but *upon probable cause, supported by Oath or affirmation* and *particularly describing* the place to be searched, and the persons or *things to be seized.*" (Emphasis supplied.)

This amendment was a result of the desire of the founding fathers to forever rid this country of the detested general warrants used in England, in the persecution of the Puritans in the 17th Century and again in the seditious libel prosecutions against Wilkes and others in the 18th century, and which warrants had been adapted by the colonial governments by way of general writs of assistance.*

It was thus that in the enumeration of the basic rights of our people, there was a most specific prohibition against any form of general writ and it was provided that the persons or things to be seized must be particularly described.

While the Fourth Amendment had its origins in political cases in the main, our courts had always zealously guarded its mandates no matter what the type of case or the form in which the demand arose. *Boyd* v. *U. S.*, 116 U. S. 616 (1885).

In the leading case of *Hale* v. *Henkel*, 201 U. S. 43, this Court, in a thorough analysis of the subject, made clear that demands for books and records, by way of subpoena, must meet the requirements of necessity and particularization called for in the Fourth Amendment, or they must fall as unlawful searches and seizures. Said the Court:

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* See *Entick* v. *Carrington*, 19 How. St. Tr. 1029; Lasson, N. B.: *The History and Development of the Fourth Amendment of the United States Constitution.*

"We are also of the opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment * * *. Applying the test of reasonableness to the present case, we think the subpoena duces tecum is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews and Forbes Company, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews and Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union.

"If the writ had required the production of all the books, papers, and documents found in the office of the MacAndrews and Forbes Company, it would scarcely be more universal in its operation or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown* 72, Mo. 83, 37 Am. Rep. 426; *Shaftsbury* v. *Arrowsmith*, 4 Ves. Jr. 66; *Lee* v. *Angas*, L. R. 2 Eq. 59."

Again, in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, where a broad demand for books

and records was stricken, Mr. Justice Holmes, speaking for this Court, stated:

> "* * * The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause, are the least considerations. It is contrary to the first principles of justice, to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 53 L. Ed. 253, 29 Sup. Ct. Rep. 115; and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville and N. R. Co.*, 236 U. S. 318, 335, 59 L. Ed. 598, 606, P. U. R. 1915 B, 247, 35 Sup. Ct. Rep. 363 * * *.
>
> "* * * The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it * * *. A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. *Hale* v. *Henkel*, 201 U. S. 43, 77, 50 Led. 652, 666, 26 Sup. Ct. Rep. 370. In the state case relied on by the Government, the requirement was only to produce books and papers that were relevant to the inquiry. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 52 Led. 327, 28 Sup. Ct. Rep. 178, 122 Ann. Cas. 658."

See also:

Brown v. *United States*, 276 U. S. 134;
Oklahoma Press Pb. Co. v. *Walling*, 327 U. S. 186;
Fleming v. *Montgomery Ward*, 114 Fed. 2d 384, cert. den. 311 U. S. 690;
Bowles v. *Beatrice Creamery*, 146 Fed. 2d 774;
U. S. v. *Medical Society*, 26 F. Supp. 55.

The test set down in each of these cases is as follows:

> "In general, the cases hold that there must be a demand suitably made by a duly constituted authority;

> that such demand be expressed in lawful process, and that the lawful process limit its requirements to certain described documents and papers which are easily distinguished and clearly described. Also, there must be relevancy to the subject of the investigation." *Fleming* v. *Montgomery Ward, supra.*

It should be noted that in none of the cases where the broad demand was stricken as lacking in sufficient particularization or necessity was the demand as all-inclusive as the one in the instant case. Here, we have not a demand which constitutes *virtually* all of the books and records, as in *Hale* v. *Henkel, supra,* but in fact a blanket demand for *all.* Counsel for Field was shocked at the demand and sought desperately some clarification before Judge McGohey. Thus counsel pointed out:

> "Mr. Rabinowitz: That means all of the books and records of the Civil Rights Congress, period. No limitation as to time, no limitation as to books, no limitation as to anything at all except all of the books and records of the Civil Rights Congress.
>
> "I submit that in absence of a very strong showing why all the books and records of the Civil Rights Congress which * * * has been in existence for some five or six years now, long before any of the questions that are involved in this main proceeding arose—unless there is some pretty strong showing of relevancy to justify a subpoena as broad and all-embracing as that, I submit that the Fourth Amendment, if it means anything at all, means that you are protected against that kind of unreasonable search and seizure" (300-301).

Analysis of the cases reveals that counsel underestimated the requirements of the Fourth Amendment. For it is our present understanding that in *no* event may a simple blanket demand be justified. There must always be specification plus a showing of relevancy.

At any rate, no answer was given to this request. No attempt was made to particularize in any way or to make *any* showing of relevancy, other than the general and

clearly insufficient statement appearing in the order to show cause.

The Court of Appeals nevertheless sustained this demand, holding: "Having in mind the nature of the inquiry, we think the direction was not so unreasonably broad as to invade the Fund's Fourth Amendment privilege."

It gave no amplification of this general holding, and petitioner has been unable to determine just what the Court had in mind. To our knowledge, the Fourth Amendment contains no exceptions, nor do the cases interpreting it indicate that its requirements may be vitiated in any particular type of proceeding or inquiry. Of course, consideration must be given to the "nature of the inquiry" to determine relevancy, but the showing of relevancy must always be made with appropriate particularization.

The effect of the Court's decision at this time in our history is particularly serious. For apparently the Court's holding is that in some kinds of inquiries, undelineated by it, a grand jury may call for the production of *all* of the books and records of an individual or organization, and that particularization and all showing of relevance may be dispensed with. Surely, if a grand jury has the power to make this kind of limitless demand, the same right is available to the innumerable congressional and executive investigating committees and to the various state investigatory bodies. It is notorious that these groups in their zeal have very often disregarded the normal safeguards to civil liberties provided in our Constitution, exposing many innocent persons to harmful publicity and often serious injury. Thus, these groups in their probing leave exposed to all the world all the affairs of political and civil organizations and anyone having business dealings with them. Here we have encouraged the actions deplored by Mr. Justice Holmes as contrary to the first principles of justice, *i.e.*, "a search through all the respondent's records relevant or irrelevant in the hope that something will turn up." And thus, we submit, "the right of the people to be secure in

their persons, houses, papers and effects, against unreasonable searches and seizures" has been rendered a hollow right.

One further comment of the Court below concerning petitioner's assertion that the demand made herein was violative of the Fourth Amendment requires mention. The Court below comments, "We doubt whether the Fund's privilege (as distinguished from Field's personal privilege) was urged on its behalf by Field as trustee (or by anyone else) before the Grand Jury, or the District Judge."

We are not sure that we understand precisely what the Court below meant by this passing remark. If Field was not acting in a representative capacity, he could not have been compelled to produce the books in any event (because he would have been protected by the Fifth Amendment; i.e., the *White* case, discussed below, would not apply) and we would never reach the issue of the application of the Fourth Amendment. If, on the other hand, Field was acting in a representative capacity, as the Court below elsewhere asserts, he clearly urged the Fourth Amendment.

III

In directing the production of the books and records of the Bail Fund, the District Court violated not only the Fourth Amendment but also the Fifth Amendment, and its prohibition against the compulsory production of self-incriminating testimony.* To justify this order, the Gov-

* The Court of Appeals also held that the witness may be compelled to answer questions "auxiliary" to the production of books and papers, and further defines "auxiliary" as "questions which sought to locate and identify the books." In support of its position, the Court cites *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, and *Pulford* v. *United States*, 155 F. 2d 944. The *Austin-Bagley* case uses the term "testimony auxiliary to the production" in referring to testimony authenticating books already produced, and this Court, in *United States* v. *Daisart*, 169 F. 2d 856, clearly stated that the *Austin-Bagley* holding was so limited. The *Pulford* case merely cites *United States* v. *Austin-Bagley* with approval. The decision of the Court here therefore represents a sharp departure from existing law.

ernment and the courts below relied on the decision of this Court in *United States* v. *White*, 322 U. S. 694.

But to extend the doctrine of the *White* case to the instant one would defeat the very purposes for which the Fifth Amendment was originally intended. For that Amendment, like the others in our Bill of Rights, was adopted primarily to give protection to political dissenters, and it should be liberally construed for that purpose.

The Court in *Hale* v. *Henkel*, 201 U. S. 43, and *Wilson* v. *United States*, 221 U. S. 361, decided that a corporation could not claim the protection of the Fifth Amendment, although it could avail itself of the benefit of the Fourth. One might well question the validity of that distinction for, as this Court has itself pointed out, there is a most intimate relation between the two Amendments:

> "They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms" (*Boyd* v. *United States*, 116 U. S. 746).

The extension of the doctrine of the *Wilson* case to trade unions in the *White* case might likewise be questioned. In the former case Justice Hughes explained why, in the Court's opinion, a corporation could not claim the privilege against self-incrimination. He said, quoting *Hale* v. *Henkel*, *supra*:

> " • • • the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporation books and papers for that purpose."

Not one of these arguments is applicable to a trade union. We point this out not to reargue the trade union problem but to avoid a further extension of the doctrine to a situation even more remote from the *Wilson* case. For the Government now urges a further extension of the *Wilson* case. It may be that policy considerations of great weight seemed to make necessary the limitations the Court imposed on Fifth Amendment rights in anti-trust and labor racketeering cases. But policy considerations of even greater weight dictate a contrary conclusion in political cases.

All political activity must be carried on through some form of organization. It was precisely to protect political and religious organizations, and the activities of its members that the privilege was first designed. "That privilege [against self-incrimination] was a consequence of the struggles of the Puritans in seventeenth century England with the ecclesiastical court, the High Commission, which sought to punish them for violations of the law against heresy." Judge Frank, dissenting in *United States* v. *St. Pierre,* 132 F. 2d 837, 842. Would it not make a mockery of the privilege designed to protect political activity if the

courts might compel production of the books and records of the political organizations through which individuals must act? It would seem absurd to say that the Puritans of 17th Century England could avail themselves of the privilege, but that the Puritan churches could not.

The distinction between a corporation or trade union on the one hand and a political organization on the other is clear. The former constitute a basic part of our modern economic life, and such entities are closely regulated today. It may be that the arguments for denying the privilege as to corporations urged by the Court in the *Wilson* case, *supra,* would justify the conclusion there reached, but quite the contrary is true of political organizations which traditionally have not been regulated by the state. Indeed, it is difficult to see how such regulation would be possible in view not merely of the Fifth Amendment but even more important, the First Amendment.

Moreover, corporations and trade unions are, in fact as well as in form, entities quite separate from their members and normally carry on activities through paid professional managers whose status is quite distinct from that of a stockholder or member. It is rare that a political organization is in any real sense an entity apart from its members. Political work is usually carried on by unpaid volunteers—"active members"—and the distinction between such an organization and its members is generally a fictitious one. A political organization *is* its members, and to hold that the members have rights not available to the organization is not only to adopt a fiction, but to render nugatory the rights of such members.

In the present case the "organization" to which the *White* case is being applied is even more amorphous than the usual political organization. The Bail Fund was created to post bail in cases involving civil and political rights. The five trustees collectively *are* the organization. The books sought are *their* books. There is no separate entity which here seeks to avoid incrimination. There are only the trustees. The privilege was created to protect just

such persons and we submit that it should not be denied them just because written rather than oral testimony is demanded.

We are aware of the Court's apparent assumption in *Rogers* v. *United States,* 340 U. S. 367, that the *White* case did apply to a political organization. The briefs and record there show that the issue was not litigated. Certainly this extension of *Wilson* and *White* should not move from dictum to decision until it has been fully presented and examined in the light of the history of the Fifth Amendment, its purpose and its application to present day problems.

IV

Even should it be held that the custodian of the records of a political organization may not plead the Fifth Amendment, the *White* doctrine is not applicable until custodianship of the books and records is admitted. This is assumed by the Government and the Court below. *Blau* (*Patricia*) v. *United States,* 340 U. S. 159, holds that a witness might properly refuse to admit such relationship, and in the absence of such admission could not be compelled to produce books and papers, because such production would in itself be a compulsory admission of the very fact of custodianship as to which the witness has a right to remain silent.

Petitioner, therefore, clearly had the right to refuse to admit that he was either a trustee or the custodian of the records, and with the exception of one series of answers relied on by the Court below, he consistently refused to state his relation to the Bail Fund or whether he was a trustee. The Court below found an admission of custodianship in the series of answers given by petitioner, set forth (somewhat incompletely; see 137-153) in footnote 1 of the Court's opinion. Such "admissions" would make the *White* case applicable only if they constituted a waiver by petitioner of his right to remain silent as to his relationship to the Bail Fund. We respectfully submit that the answers given cannot constitute a waiver.

"Waiver of constitutional rights * * * is not lightly to be inferred," *Smith* v. *U. S.*, 337 U. S. 137. It profits us little if this language is quoted, only to be distinguished or disregarded. A waiver is a free, deliberate and voluntary act; a basic constitutional right cannot be waived unintentionally or by inadvertence or oversight. It is clear that, applying these tests, petitioner waived nothing and admitted nothing. For, as the Court said in *Smith* v. *U. S.*, *supra*, "It is plain here that the petitioner relied from the beginning of his examination upon his privilege." Both before and after the testimony relied upon below, the petitioner steadfastly refused to admit any relationship to the Bail Fund.*

It must be noted that during this entire period the witness was under considerable strain, both physical and psychological. He had been subjected to extensive examination for several days before Judge Ryan, as a consequence of which he was even then in custody. He had been taken, while in custody, to the District of Columbia where he had testified before a full-dress session of the McCarran Committee on a subject quite independent of that involved in

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* Before the testimony cited by the Court, the record shows the following questions put to the witness, to which he gave the following answers:

> Q. Are you, and have you been a trustee of the bail fund of the Civil Rights Congress of New York? A. I also, sir, will have to decline to answer that question on the ground that the answer may tend to incriminate me.
>
> * * * * * * *
>
> Q. * * * Now I repeat the question: Are you and have you been a trustee of that bail fund? A. Mr. Saypol, I will have to decline that question on the ground that the answer may tend to incriminate me" (139).

Similarly, immediately after the testimony set forth in the Court's opinion, the witness was asked: "As between yourself and Green, who dominates this bail fund, who controls it, you or Green or both of you, or the trustees? How does it operate?" (140). The witness declined to answer, specifically referring to the Fifth Amendment privilege. Several days later, he was asked: "Are you a trustee of the Bail Fund of the Civil Rights Congress of New York?" He again declined to answer, on the same grounds (140).

the New York proceedings. He had, on several occasions, been taken by the United States Marshal to attend lengthy examinations before the New York State Banking Department, which was also investigating the affairs of the Bail Fund. When the witness pointed all of this out to the United States Attorney, saying, "I have literally been rushed from one proceeding to another without a single day, except weekends off," Mr. Saypol replied, "It's quite evident that you have been the center of centrifugal pull for the last couple of weeks * * * " (276-279). While it may have been true, as Mr. Saypol pointed out, that the harassment of the witness was of his own making, it is also undeniably true that he was being harassed. It is small wonder that under such circumstances the witness was unable to solve, with success, the dilemma posed by Mr. Justice Black in his dissenting opinion in *Rogers* v. *U. S.*, *supra*, at page 378.

The right to exercise the privilege against self-incrimination should not be made the subject of a game of chance, in which a few answers inadvertently given by a harassed and tired witness, may be seized upon as a waiver of his constitutional privilege. Constitutional rights cannot be so cavalierly treated. The decision of the Court below here extends the doctrine of waiver far beyond any previous decision which has come to our attention. Certainly, the decision in *Rogers* v. *U. S.*, *supra*, cannot by itself justify the application made by the Court in the instant case. Indeed, this purported application of the *Rogers* decision illustrates the potential evils of that ruling which, if not sharply limited, may give rise to the unwanted consequences noted in the dissent.*

* We have assumed, for the purpose of this discussion, as did the Court below, that the colloquy relating to the retention of counsel was in fact an admission of custodianship. Actually, at the very most, it was only an admission of trusteeship, and a careful reading of the answers given raises doubts as to whether even that relationship was admitted.

V

The instant case presents several different substantial questions which warrant review by this Court. It should be noted in this connection that the District Court specifically found the petitioner guilty of contempt for two reasons, *i.e.*, his failure to answer questions and his refusal to produce books and records. Under the decision of this Court in *Gompers* v. *Buck's Stove & R. Co.*, 221 U. S. 418, 440, if the lower court was in error as to *either* aspect, its decision must be reversed.

An additional compelling reason for review is the fact that the witness may be recalled by the Grand Jury upon his release from custody and may be asked the same questions. This was commented upon in both the majority and minority opinions in the Court of Appeals. Similar predictions have appeared in the New York press on several occasions within the last two weeks. Unless the rights of petitioner are finally adjudicated by this Court, the unsettled questions of law here raised may well result in further Grand Jury subpoenas, further contempt proceedings, similar sentences, and further abortive appeals, or the forced surrender by a reluctant citizen of his constitutional rights in order to avoid such a consequence. It must be borne in mind that this is the second time petitioner has been convicted for his assertion of the Fifth Amendment privilege in this connection.

Nor would the errroneous rulings of the Court below be limited in their repetition to the petitioner. For as the latest statement of the law on the subject, the decision of that Court would govern the actions of innumerable legislative and executive investigatory bodies throughout the land. It would indeed be unfortunate were these agencies and the persons appearing before them guided by erroneous law which must so seriously invade constitutional rights.

CONCLUSION

We sincerely urge that the decision of the Court below represents a serious blow to the political liberty and personal freedom long cherished by the American people. The comments of Judge Frank as to a limited aspect of this case might be applied with equal force to the whole of it: "* * * if by one after another encroachment we keep diminishing this constitutional privilege, a bit here and a bit there, I fear that we are likely to move rapidly, although unwittingly, in the direction of the unfree, authoritarian kind of government whose principles have long seemed unprincipled to Americans."

For the foregoing reasons, the petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

VICTOR RABINOWITZ,
Attorney for Petitioner,
76 Beaver Street,
New York 5, New York.

Dated: November 19, 1951.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 300, 301, and 302—October Term, 1950.
(Argued September 14, 1951 Decided October 30, 1951.)
Docket Nos. 22116, 22117, and 22118

UNITED STATES OF AMERICA,

Appellee,

v.

FREDERICK V. FIELD, DASHIELL HAMMETT, and W. ALPHAEUS HUNTON,

Appellants.

Before: CHASE, CLARK, and FRANK, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York.

Frederick V. Field, Dashiell Hammett, and W. Alphaeus Hunton appeal from orders adjudicating them severally guilty of contempt for refusing to answer questions and to produce certain books and records before the court. Affirmed.

MARY M. KAUFMAN, of New York City (VICTOR RABINOWITZ, of New York City, on the brief), for appellants Frederick V. Field and W. Alphaeus Hunton.

CHARLES HAYDON, of New York City, for appellant Dashiell Hammett.

ROY M. COHN and JAMES B. KILSHEIMER III, Asst. U. S. Attys., both of New York City (IRVING H. SAYPOL, U. S. Atty., and ROBERT MARTIN, Asst. U. S. Atty., both of New York City, on the brief), for the United States, appellee.

CLARK, *Circuit Judge:*

This appeal, from three summary orders of contempt, is an aftermath of the affirmance by the Supreme Court in *Dennis et al.* v. *United States,* 341 U. S. 494, of the conviction of eleven officers of the Communist Party of America for violation of the Smith Act, 18 U. S. C. § 2385. Those defendants had been enlarged on bail in the sum of $20,000 each, furnished by the Bail Fund of the Civil Rights Congress of New York pending appeal to this court and, after affirmance, *United States* v. *Dennis et al.,* 2 Cir., 183 F. 2d 201, pending certiorari by Circuit Justice Jackson, *Williamson et al.* v. *United States,* 2 Cir., 184 F. 2d 280, because of the substantial issue of law involved. The present appellants are three of the five trustees of that Fund. When the District Court received the mandate of final affirmance by the highest court on July 2, 1951, it ordered the surrender of the defendants, to commence service of their sentences of imprisonment. Seven appeared and were duly incarcerated. Four did not; and when bench warrants did not produce them on the next day, their bail was declared forfeited. The court then directed the appearance before it of the bondsmen and trustees and officers of the Bail Fund which had acted as surety for the fugitives. Appellants appeared and were examined by the court and by the United States Attorney

at hearings occupying several days—Field on July 3 and 5, Hunton on July 6 and 9, and Hammett on July 9. All refused to answer certain questions and to produce certain books and records of the Bail Fund and were cited for contempt, Field on July 5, and the others on July 9. Field was sentenced to imprisonment for ninety days or until such time as he might purge himself of his contempt. The others were sentenced for six months, with like provision for purging themselves.

These are the orders we have for review. Certain later proceedings should, however, be noted. Field applied to Chief Judge Swan for bail pending appeal, who eventually denied the application in a detailed opinion reported in *United States* v. *Field,* 2 Cir., 190 F. 2d 554; and this was concurred in by Judge L. Hand in denying similar applications by Hammett and Hunton, *United States* v. *Hunton et al.,* 2 Cir., 190 F. 2d 556. Thereafter all three made like petitions before Justice Reed as Acting Circuit Justice for the circuit. Justice Reed denied the petitions in a comprehensive opinion dated July 25, 1951. The opinions of these several judges cover with meticulous care a substantial part of the case now before us on this full review of the entire record, and we have been greatly aided by the clear statements of the law there set forth.

Meanwhile Field, having refused to comply with directions of a federal grand jury, was found in contempt and sentenced to an additional term of imprisonment of six months—an order we are reviewing in the companion case herewith of *United States* v. *Field,* 2 Cir., —— F. 2d ——. A fourth trustee, Abner Green, was also held in contempt of directions both of a grand jury and of the court in proceedings decided in the third appeal herewith, *Green* v. *United States,* 2 Cir., —— F. 2d ——. Application for a special session of the court during the summer recess having been granted, these three appeals were heard at a single sitting in September. It is a matter of regret to the court that some delay in disposing of the cases has

occurred, due to illness in the court, pressure of judicial work upon the opening of the regular October term, and the gravity of the issues involved.

The record before us shows that when the judge undertook his inquiry into the escape of the fugitives, there were placed before him the documents filed in court when the bonds were given. These included, first, the "Agreement and Deed of Trust," dated originally September 16, 1946, and amended September 26, 1949, and signed by the five trustees, with the fifth trustee, Robert W. Dunn, signing a second time as "Treasurer." This provided that the Fund was to accept both loans and gifts—for which certificates of deposit and receipts were to be given the lenders and contributors respectively—to be employed in posting bail "for the benefit of strikes, and of those whose civil rights are threatened or under attack." Second, there was a statement under oath, dated November 3, 1949, by three trustees—Field, Dunn, and Hunton—reciting specific authority to Dunn to post the Government Bearer bonds, purchased with moneys given "by diverse persons," as collateral security for bail for the eleven specifically named defendants. It also stated that "in addition to the general authority [sic] contained in the annexed Agreement and Deed of Trust, all the trustees duly adopted a resolution at a meeting of the trustees held on July 22, 1948, reading as follows: Resolved that the trustees hereby authorized the use of the bail fund for such bail as might be required in the case of the Communist leaders indicted under the Smith Act on July 20, 1948, at all stages of the proceedings and until the case is finally terminated." And third, there were the formal "Bonds on Appeal" in the penal sum of $20,000 conditioned on the appearance of the particular defendant named whenever required by law or order of the court and signed by the particular defendant as Principal and Dunn as Surety.

At the hearing on July 3, Field appeared voluntarily without waiting to be subpoenaed. Advised that the pur-

pose of the hearing was to make inquiry of the sureties under oath as to their knowledge of the whereabouts of the defendants whom the court was seeking—an inquiry "to assist the Court in effecting service of its process, which has been issued"—he was duly sworn and proceeded to testify. At first he answered readily, stating that he was a trustee of the Fund, that he had paid several visits to the headquarters of the Communist Party during the previous week in order to assure himself that the defendants would appear, and that during one of these visits he had seen at least two of the four who had failed to appear. His first refusal to answer was to a question as to the source of the funds which the group had used in posting the bond in question. He was then asked a series of questions pertaining to the last time he had seen the fugitives, the functioning of the Bail Fund, its officers, and the records it kept. These he answered, with the exception of questions pertaining to those who had contributed to the Fund, as to which he now responded affirmatively to a suggestion in a question put by the court that such a disclosure might tend to incriminate him. Thereafter he stood definitely on this claim of privilege under the Fifth Amendment. When the hearing was resumed on July 5 the court after further questioning ordered the production of the books and records of the Fund which Field had described. Again he refused, alleging the same privilege. The court then made a specific direction that the records be produced and the questions answered. The witness continued his refusal and the citation for contempt followed.

Next Hunton was sworn, having also appeared without subpoena upon being advised that the matter was before the court. He likewise admitted his trusteeship of the Bail Fund. Beyond this, however, he would not go; he declined, on grounds of the privilege against self-incrimination, to answer numerous questions concerning the nature and location of the Fund's records, acquaintanceship with the four fugitives, the time when he had last seen them,

whether the signatures on the bond or trusteeship agreements were his, and even whether or not he knew what records the Bail Fund kept. Directions to produce such records were variously answered with a plea that he had no control over them and, later, with a plea of the privilege. Specific directions to answer the questions and produce the books were ignored and he also was sentenced for contempt.

When Hammett appeared on July 9 he would admit nothing; he met all questions, including his trusteeship of the Fund, the signatures on the minute book (which Field had produced), his knowledge of the fugitives, and the nature of the books of the Fund, with the same plea. After the court's overruling of the plea and his continued refusal, he too was sentenced for contempt.

Appellants seek reversal here on two basic tenets: that the court had no jurisdiction to conduct the inquiry, and that the appellants were protected by their privilege against self-incrimination under the Fifth Amendment which they had validly asserted.

1. Jurisdiction of the District Court

Appellants' vigorous attack on the court's jurisdiction even to institute and prosecute the inquiry is based upon the premise that the matter concerned a possible crime against the United States. It is the exclusive province of the executive arm of government, they contend, to investigate such matters and, if facts justify, submit them to the courts through the process of grand jury indictment after review of the evidence. The precedents upon which they rely are cases where duties of investigation or of acting as a "one-man grand jury" were held improperly granted or "delegated to" the courts. See, e.g., *Re Richardson,* 247 N. Y. 401, 160 N. E. 655; *In re Oliver,* 333 U. S. 257.

But we think this argument misses the real point as to the court's authority to take steps to effectuate its own decrees. True, there may have been crimes committed in connection with the flight of the fugitives, as under the Harboring Act, 18 U. S. C. §§ 1071, 1072; and the grand jury investigation which led to the contempt orders reviewed in the companion cases was obviously natural and desirable in this area. But the possibility of accusation and prosecution under a statute defining a crime does not offer or suggest any immunity for violating the direct mandate of a court; two different powers are involved, though the acts and events may be the same or interwoven. And we suggest that any conception restricting a court from taking even such limited steps to effectuate its decrees as investigating the reasons for noncompliance is not only novel, but abhorrent to any idea of effective justice. Carried to its logical conclusion it would mean that a court cannot issue execution or supplementary writs to carry its judgments, civil or criminal, into effect, but must await the chance action of some outside agency; it would also mean that it cannot issue warrants for the detention of the fugitives themselves. Actually of course courts have always exercised such powers; specific instances alone, and not the broad principle itself, have been challenged. True, the court may call upon the executive to assist its authority or carry out its mandate; but that its mandate must be obeyed, whether or not effectuated by enforcing officers of another arm of the government, even to the forfeit of human life if necessary, is quite clear. For this reason a federal officer executing the process of a United States court, or even merely guarding the person of a federal justice, is immune from state prosecution for a homicide committed in performance of these duties. See *In re Neagle*, 135 U. S. 1, and cases cited; *Ex parte Jenkins*, Fed. Cas. No. 7,259, 2 Wall. Jr. 521; *Ex parte Turner*, Fed. Cas. No. 14,246, 3 Woods 603; *Beckett* v. *Sheriff Harford Co.*, C. C. D. Md., 21 F. 32; and cases collected in 65 A. L. R. 732.

Mr. Justice Reed, in his opinion cited above, succinctly answers appellants' argument as to the District Court's jurisdiction thus:

"District Courts of the United States have jurisdiction of all offenses against the laws of the United States. 18 U. S. C. § 3231. They 'may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.' 28 U. S. C. § 1651. 'The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment is satisfied.' *Wayman* v. *Southard,* 10 Wheat. 1, 23. Under ancient practice bench warrants are issued on indictments to bring defendants before the court for trial, and after violation of bail, either before or after conviction, warrants issue in order that a judgment may be executed. There can be no doubt of the power of the court to direct the bench warrant for the arrest of the four fugitives from justice in the case of Dennis et als." We agree.

"Furthermore, it is fundamental that federal courts, in common with other courts, have inherent power to do all things that are reasonably necessary for the administration of justice, within the scope of their jurisdiction." *Strohbar* v. *Dwinnell,* 5 Cir., 29 F. 2d 915, 916. See also *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 143 A. L. R. 435. Here the court was properly continuing the effective disposition of the litigation initiated in the *Dennis* case; and examination of those who, as developed below, had constituted themselves "in truth jailers of the fugitives, responsible for their appearance," was a natural and appropriate step.

Mr. Justice Reed, who is author of the clause just quoted, also went on to point out that a mere witness was not entitled to question the court's jurisdiction: "It is enough if the court has a de facto existence and organization," citing *Blair* v. *United States,* 250 U. S. 273; *United States* v. *Shipp,* 203 U. S. 563, 573; and *United States* v.

United Mine Workers of America, 330 U. S. 258, 293. But the jurisdiction of the court seems to us so clear that we do not need to resort to this additional ground.

2. The Privilege Against Self-Incrimination

While the questions of the court to the appellants and the order for production of the Fund's books were all a part of the one attempt to obtain information as to those who had advanced money for the bail and might reasonably be expected to have knowledge of their whereabouts, a separation of the issue as to the books from that as to the questions is expedient. For the Supreme Court has already given such clear guidance in the realm of organization records that we think no doubt can exist as to this first issue. In *United States* v. *White,* 322 U. S. 694, 699, 152 A. L. R. 1202, the Court upheld the conviction for contempt of a custodian of books of a labor union, saying that official records held "in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." This is a settled rule, as shown by *Wilson* v. *United States,* 221 U. S. 361. The authority would seem particularly conclusive here, since these trustees of a declared trust, probably even more clearly than union officers, are acting as representatives of a group, rather than in their own purely private or personal interest.

The conclusions thus reached necessarily require affirmance of the convictions. What effect, if any, a possible error disclosed in the remainder of the record should have is not overclear. In *Blau* v. *United States,* 340 U. S. 332, 334, 335, the majority did not decide the point; but the minority opinion indicates that the entire conviction would still be valid, citing *Pinkerton* v. *United States,* 328 U. S. 640, 641, n. 1; *Hirabayashi* v. *United States,* 320 U. S. 81, 84, though the appellants might apply under F. R. Cr. P.,

rule 35, to the district court to exercise its discretion to reduce the sentences. While decision of the further issues in this case may therefore not be required, nevertheless since they are definitely presented by the record and may be of importance in the ultimate disposition of this case, as well as other like cases, we think consideration of the problem at this time is desirable.

The questions asked of these appellants fell into certain distinct patterns. We shall dismiss at once those which concerned their positions as trustees of the Fund, because Field and Hunton readily admitted their office, and Hammett (as well as they) was committed by the deed of trust and trustee vote, filing of which was required by the District Court for acceptance of the bail originally. Nor need we stop as to those questions which sought to locate and identify the books; for these were proper under the precedents. Once custodianship of the books was admitted, the custodian had no privilege as to questions "auxiliary to the production," and was obligated not merely to produce them, but also to make their use in court possible "without requiring other proof than his own." *United States* v. *Austin-Bagley Corp.*, 2 Cir., 31 F. 2d 229, 234, certiorari denied *Austin-Bagley Corp.* v. *United States*, 279 U. S. 863; *Pulford* v. *United States*, 6 Cir., 155 F. 2d 944, 947. So far, it is clear, there was no breach by the court of the constitutional privilege; and Hunton and Hammett, who refused to answer even these questions, were properly held in contempt. Remaining for consideration are two important series of questions: as to what the books would reveal and particularly as to the names of donors to the Bail Fund; and as to any clue or information appellants might have bearing on the whereabouts of the fugitives. All three appellants refused to answer the first series of questions. Field answered the latter series, but Hunton and Hammett did not.

So far as Field's original refusal to disclose the names of donors to the Fund was based on some desire to shield

those persons, it manifestly cannot stand. So the Supreme Court explicitly ruled as to names of party members in *Rogers* v. *United States,* 340 U. S. 367, 371. For the privilege is a personal one which cannot be interposed to protect others from possible criminal prosecution. *United States* v. *Murdock,* 284 U. S. 141, 148, 82 A. L. R. 1376; *Hale* v. *Henkel,* 201 U. S. 43, 69. Legally the controlling principle is clear. Practically the same result is at least indicated, for a fund owned by "a great many hundreds of individuals," as Field said, each holding a certificate of deposit or receipt, cannot long remain secret when losses deplete or exhaust it and some protection of the depositors becomes imperative. Excuse, if any, must therefore be found in the claim of the constitutional privilege by the individual involved and in the particular situation.

The privilege against self-incrimination is of course one of the great constitutional rights, not lightly to be pushed aside. *Hoffman* v. *United States,* 341 U. S. 479, 486; *Blau* v. *United States,* 340 U. S. 159; *Smith* v. *United States,* 337 U. S. 137, 150. Consideration of its exercise here must be approached, however, in the perspective before the court at the time and freed of questions troublesome at earlier stages of this same litigation. As the thoughtful opinions of the various courts have demonstrated, the original prosecutions in the *Dennis* case presented serious problems of adjusting traditional views of freedom of expression to the need for guarding against a dangerous attack upon government itself. These are now all settled for this case by the final decision of our highest court; here we have to deal only with the pursuit of fugitive felons and how far those responsible to the court for their appearance may refuse pertinent information by claiming the privilege.[1] The rule applicable must be the same as

[1] Mr. Justice Reed ruled that a witness before a court, not a party, cannot take exception to the materiality of the questions, citing *Nelson* v. *United States,* 201 U. S. 92, 114. While we agree, we think the questions *prima facie* material to the inquiry the court was making. Some persons had made a large total investment in the

with any other federal convicts and their bail; what we hold must necessarily have that generality of application.

Directly involved, too, is another constitutional right, that against "excessive bail" granted by the Eighth Amendment. For appellants' thesis, considered in detail below, comes to rest upon the contention that the surety's obligation is fixed and limited by the cash deposit made, or in effect that a charge of crime can be commuted into some stated sum of money, payment of which terminates all surety responsibility. Such a monetary evaluation of crime is definitely at variance with the settled principle that bail is to be only in such amount as "will insure the presence of the defendant,"[2] and, if pursued logically, will seriously prejudice the furnishing of bail pending trial, particularly in the case of crimes against the government's existence, where an amount so determined is sure to be high. Indeed, the many appeals now developing concerning high bail are perhaps a consequence of the vigorous pressing of such contentions which may already have weakened the traditional value of a bail bond with responsible surety.

So the basic question before us has been much argued in terms of waiver, with consideration directed to what

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appearance of these fugitives before the court when required; it would be proper to ascertain how concentrated was this investment and whether or not the larger investors at least had any knowledge of the flight of their principals or had taken any steps to endeavor to produce them.

[2] F. R. Cr. P., rule 46(c), continuing: "having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." See also *United States ex rel. Rubenstein* v. *Mulcahy*, 2 Cir., 155 F. 2d 1002; *United States ex rel. Potash* v. *District Director of Immigration and Naturalization*, 2 Cir., 169 F. 2d 747, 751; *United States ex rel. Pirinsky* v. *Shaughnessy*, 2 Cir., 177 F. 2d 708; *Zydok* v. *Butterfield*, 6 Cir., 187 F. 2d 802, 804; *Williamson* v. *United States*, 2 Cir., 184 F. 2d 280; *People of the State of Ill. ex rel. Sammons* v. *Snow*, 340 Ill. 464, 173 N. E. 8, 72 A. L. R. 798, with annotation at 801.

each appellant may have done or not done toward waiving his privilege. We think, however, that this is a confining approach to the problem before us. Rather should the situation be viewed from the broader aspect of the nature and extent of the obligations originally assumed by these appellants. For all present intents and purposes they are to be regarded as the sureties, though only Dunn, the treasurer of their group, actually signed the bonds. The court required the nature of the trust to be disclosed through the documents mentioned above, and they hereby all accepted the obligation for the use of the Bail Fund for such bail as might be required at all stages of the pending prosecution and until its final termination.

In his Commentaries, Blackstone sets forth the traditional "nature" of bail as "a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their friendly custody instead of going to gaol." 4 Bl. Comm. 297. So the Supreme Court expressed a like thought in refusing to hold a person immune from arrest on an indictment for which he had already forfeited bail. Mr. Justice Story said: "A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offense when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offense." *Ex parte Milburn*, 9 Pet. 704, 710. This same conception is repeated in many cases which find involved a "moral risk as well as the material risk." *Concord Casualty & Surety Co.* v. *United States*, 2 Cir., 69 F. 2d 78, 81, 91 A. L. R. 885, where Judge Swan pointed out: "If the court lacks confidence in the surety's purpose or ability to secure the appearance of a bailed defendant, it may refuse its approval of a bond even though the financial standing of the bail is beyond question." To this point he cited *United States* v. *Lee*,

D. C. S. D. Ohio, 170 F. 613, 614, where the court made a particularly strong statement as follows: "In the theory of the law, by a recognizance of bail in a criminal action, the accused is committed to the custody of the sureties as to jailers of his own choosing, and is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and are bound, at their peril, to see that he obeys the court's order."

Among other cases which may be cited to the same effect are *United States* v. *Ryder,* 110 U. S. 729; *Reese* v. *United States,* 9 Wall. 13, 21; *Taylor* v. *Taintor,* 16 Wall. 366, 371; *Cosgrove* v. *Winney,* 174 U. S. 64, 66; *United States* v. *Simmons,* C. C. S. D. N. Y., 47 F. 575, 14 L. R. A. 78; *United States* v. *Caligiuri,* D. C. N. J., 35 F. Supp. 799, 801. It was this line of compelling precedents upon which Mr. Justice Reed relied in holding these trustees "in truth jailers of the fugitives, responsible for their appearance."

Appellants urge that this is an older concept which must yield to the view, implicit in modern statutes allowing the deposit of cash or securities in lieu of a bail bond, that a surety's duty is a pecuniary and wholly impersonal one. It is of course true that many states have such statutes and state courts in many jurisdictions have relied upon them to settle in favor of the surety the mooted point as to the validity of an indemnity bond given by a prisoner to his surety. *Western Surety Co.* v. *Kelley,* 27 S. D. 465, 131 N. W. 808; see Note, 35 Va. L. Rev. 496, 502. Contra *Sansome* v. *Samuelson,* 222 Minn. 417, 24 N. W. 2d 702, 170 A. L. R. 1158, with annotation 1161-1170; *United States* v. *Simmons,* C. C. S. D. N. Y., 47 F. 575, 14 L. R. A. 78. In *Leary* v. *United States,* 224 U. S. 567, Ann. Cas. 1913D 1029, the Supreme Court upheld such an express agreement, relying upon New York law and citing New York decisions "as founded in good sense." Appellants stress this decision and quote from it certain references to the impersonal character of the surety's obligation. But these expressions are taken out of the context, which was a favoring opinion as to a surety *as against his principal,*

and not as against the government. Greater freedom to the surety in this regard may well be a strengthening factor in the bail relationship; at any rate we are clear that this favor cannot be held to overturn the long and settled line of cases to which we have referred.

Moreover, the Rules, we think, make the point clear. Thus F. R. Cr. P., rule 46(d) provides that "a person required or permitted to give bail shall execute a bond for his appearance. One or more sureties may be required, cash or bonds or notes of the United States may be accepted and in proper cases no security need be required." The Committee Note states that "this rule is a restatement of existing practice, and is based in part on 6 U. S. C. A. § 15"—the statute which provides for the deposit of bonds or notes of the United States in lieu of a recognizance or bond. This shows the Committee's interpretation of the power thus given to require sureties; of course if there be thought to be any difference between the rule and the statute, the rule prevails under the terms of the rule-making act, 18 U. S. C. § 3771, formerly § 687.

Again the same principle appears in another rule much relied on by appellants, although it appears to us to have a different significance. That is the provision of F. R. Cr. P., rule 46(g), that "a surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody." This, too, is said in the Note to be "a restatement of existing law and practice," based in part on 18 U. S. C. § 599, now § 3142, providing for the surrender of his principal by the bail. The latter part of this is old. "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge." *Anonymous*, 6 Mod. 231, quoted in *Taylor* v. *Taintor*, 16 Wall. 366, 371, 372. But the provision for the deposit of cash is significant; it shows quite clearly that the surety owes an obligation beyond the mere deposit for which some method of ex-

oneration in fairness must be devised. If the utmost extent of his obligation is to lose his money, he will hardly put it up as exoneration before loss is shown. Under the rule, however, the surety can get exoneration from his continuing responsibility as jailer; and the court may then order different and perhaps better bail. Thus in *United States* v. *Flynn*, 2 Cir., 190 F. 2d 672, 673, this court spoke approvingly of the revocation of bail given by these trustees in other cases before the District Court because they "had shown, by refusing to answer questions relating to the bail fund and their connection with the defendants, a disregard of their responsibilities as sureties for the discovery and presentation before the court of their principals."

Such is the nature of the obligation assumed by these appellants when they provided for the bonds originally in the District Court. It is obvious that exercise of their constitutional privilege completely sets at naught their definite obligation. This is perhaps most clearly demonstrated in the case of Hammett, who refused to lend the court's process assistance of any kind.

It is not a new thing to hold that the privilege may be limited in various ways by a previous obligation otherwise assumed. Examples of limitations validly set upon its exercise are found in the various requirements for the disclosure of information set by the state as a correlative of the pursuit of certain activities. Thus doctors must report deaths and their causes, druggists must show their prescription lists, mine owners must report details of accidents in their mines and motor vehicle operators must report details of collisions on the highway. *Ex parte Kneedler*, 243 Mo. 632, 639, 147 S. W. 983; *People* v. *Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A., N. S., 977; *State of Kansas* v. *Razey*, 129 Kan. 328, 282 P. 755, 66 A. L. R. 1225, with annotation at 1228; *Ule* v. *State of Indiana*, 208 Ind. 255, 194 N. E. 140, 101 A. L. R. 903, with annotation at 911; *Commonwealth* v. *Joyce*, Mass. , 97 N. E. 2d 192 (citing cases). Various examples are also

given in *Shapiro* v. *United States,* 335 U. S. 1, 17-19, 59-65, which is itself important because of its holding that the records required to be kept by OPA regulations under the wartime price controls were not subject to the privilege. See also *United States* v. *Darby,* 312 U. S. 100, 125, 132 A. L. R. 1430; *Davis* v. *United States,* 328 U. S. 582.

Dean Wigmore states that this privilege, like others, should be subject to relinquishment by contract, express or implied, in advance or retrospectively, and cites in support such cases as *Green* v. *Weaver,* 1 Sim., Ch., 404; *Hickman* v. *London Assur. Corp.,* 184 Cal. 524, 195 P. 45; *Swedish-American Tel. Co.* v. *Fidelity & Casualty Co.,* 208 Ill. 562, 70 N. E. 768. See 8 Wigmore on Evidence § 2275, 3d Ed. 1940. He also says that such an agreement may be required of, and enforced against, public officers, § 2275a; and see also Seabury, Address at American Law Institute 1932, 18 A. B. A. J. 371, 372. On the other hand, certain state court opinions have assumed that police officers may stand on their constitutional privilege in refusing to answer questions concerning a violation of their official duty. *Christal* v. *Police Commission,* 33 Cal. App. 2d 564, 92 P. 2d 416; *In re Lemon,* 15 Cal. App. 2d 82, 59 P. 2d 213; *Drury* v. *Hurley,* 402 Ill. 243, 83 N. E. 575. These cases may fall short of clear precedents, since they deal with the issue collaterally by holding that such officers violate their duty in making the claim and may properly be discharged because of such violation. Yet there seems no reason to quarrel with the suggestion, since obviously the principle cannot be pressed to hold that all acceptance of office carries an obligation to perform without resort to the constitutional protection. Else a public officer or judge must disclose all bribes, a bank official all embezzlements, indeed, a citizen all violations of his obligation to good citizenship. *Louisville, H. & St. L. Ry. Co.* v. *Schwab,* 127 Ky. 82, 105 S. W. 110; *Scholl* v. *Bell,* 125 Ky. 750, 102 S. W. 248. Naturally the obligation deduced from the accepted activity must be close and direct, and not the merely general burden of either citizenship or due per-

formance of accepted office. More apposite is the holding that direct waiver of immunity may constitutionally be required of public officials, including police officers, and applied even as to acts before the passage of the statute. *Canteline* v. *McClellan,* 282 N. Y. 166, 25 N. E. 2d 972. The question thus appears to be one of the directness of the obligation undertaken upon entry into the office.

In the present case the obligation assumed by these appellants to act as jailers for their principals was much more direct and immediate than any undertaken by wholesalers and retailers who continued in their respective businesses after the OPA regulations upheld in *Shapiro* v. *United States,* 335 U. S. 1, went into force. There they had little voluntary choice; here choice was complete.[3] Here, too, nullification of the obligation by resort to the privilege is yet more complete than that adverted to in the *Shapiro* opinion. Moreover, there is a certain anomaly, realistically viewed, in a ruling which, while upholding the major contention as to production of the books, sticks in the bark as to the implementing questions concerning their contents.[4] We conclude that questions

[3] The element of choice is stressed, for example, in cases such as *People* v. *Rosenheimer, supra,* 209 N. Y. 115, 102 N. E. 530, 46 L. R. A., N. S., 977, against interesting dissent and opposing views below, 70 Misc. 433, 128 N. Y. S. 1093, 146 App. Div. 875, 130 N. Y. S. 544, relying upon the privilege involved in the operation of a motor vehicle on the highway and thus supporting a statute making it a felony for a motor vehicle operator to leave the scene of an accident without stopping and giving his name, residence, and license number, or, if no police officer is about, of reporting the accident to the nearest police station.

[4] Several recent and thoughtful articles have stressed the desirability of disclosures of the type we have been discussing and the availability of other less controversial types of constitutional guaranty for protection of individual liberties in this area, *e.g.,* freedom of speech of the First Amendment and the prohibition against illegal search and seizure of the Fourth Amendment. See, *e.g.,* Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination,* 18 U. of Chi. L. Rev. 687; Morgan, *The Privilege Against Self-Incrimination,* 34 Minn. L. Rev. 1; *Quasi Public Records and Self-Incrimination,* 47 Col. L. Rev. 838; Davis, *The*

directly pertinent to the whereabouts of the fugitives or to clues to trace down their whereabouts cannot be defeated by claim of the privilege; else the obligation assumed is meaningless (and doubly so if all possibility of penalty is limited to some merely future prohibition of further bonding or vague threat of nonexistent damages). And it does not seem to us that the questions here asked went beyond these limits. Certainly the objective of the judge in asking them was clearly within these limits; answers to them, while only remotely and at best unclearly dangerous to appellants, were potentially capable of providing direct assistance to his inquiry. Hence repeated refusals in repudiation of the definite responsibility thus assumed were properly visited with the customary penalties exacted for defiance of a court acting in the normal exercise of its appropriate functions.

Convictions affirmed.

FRANK, *Circuit Judge* (concurring as to affirmance but dissenting as to one ruling):

1. I entirely agree that we must affirm the convictions on the grounds that the court had jurisdiction, and that the defendants had no constitutional privilege either with reference to producing the Bail Fund's records or as to oral testimony concerning matters "auxiliary to the production" of those records.

2. But I disagree on one point decided in the last few paragraphs of my colleagues' opinion: The defendants were asked to testify orally in answer to some other questions which—so my colleagues concede—(1) would tend to self-incrimination, (2) were not at all "auxiliary" to

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Administrative Power of Investigation, 56 Yale L. J. 1111, 1137, 1138, 1154; *The Privilege Against Self-Incrimination*, 49 Yale L. J. 1059, 1067-1069, 1078. See also the broad provisions of the A. L. I. Model Code of Evidence, Rules 206, 207, 1942.

the production of the records, and (3) would ordinarily be covered by the anti-self-incrimination constitutional privilege. Peculiarly within that category were questions about when the defendants last saw, or about their acquaintance with, the *Dennis*-case refugees. This is precisely the kind of question the reply to which the Supreme Court, earlier this year, held privileged as tending to self-incrimination, in a case much like this. See *Hoffman* v. *United States*, 341 U. S. 479. There the witness Hoffman refused, when asked, to give testimony as to his connections with fugitives for whom bench warrants had been issued. The questions to which the privilege applied were (341 U. S. at 481):

> "Q. Do you know Mr. William Weisberg? A. I do.
> "Q. When did you last see him? A. I refuse to answer.
> "Q. Have you seen him this week? A. I refuse to answer.
> "Q. Do you know where Mr. William Weisberg is now? A. I refuse to answer."

The following, almost identical questions asked the defendant Hunton in the present case, are held today by my colleagues to be without the privilege:

> "Q. Do you know Henry Winston? A. I cannot answer the question on the ground that the answer may tend to incriminate me.
> "Q. Do you know where Robert G. Thompson, Gilbert Green, Gus Hall or Henry Winston are presently located? A. I do not.
> "Q. When did you last see Robert G. Thompson? A. I decline to answer on the ground that the answer might tend to incriminate me.
> "Q. When did you last see Gilbert Green? A. I decline to answer on the ground that the answer might tend to incriminate me.
> "Q. Have you seen Robert G. Thompson since Thursday of last week? A. I decline to answer on the ground that the answer might tend to incriminate me.
> "Q. Have you seen the defendant Gilbert Green since July 5? A. I decline to answer on the ground that the answer might tend to incriminate me."

My colleagues' position as to those questions is this: The defendants bargained away the privilege many months before any judicial inquiry arose, when they voluntarily became sureties and thereby impliedly promised to disclose to the government any information which might aid in bringing into custody the convicted persons for whom the defendants had gone bail. I have no doubt that the defendants did assume that obligation. Doubtless, too, the effective assertion of the privilege would be flatly inconsistent with that obligation and would be a breach of it. But I do not accept my colleagues' thesis that a court may criminally punish a man who breaks such a contract by which he agrees, long in advance, to surrender his anti-self-incrimination privilege. In short, I think that no such advance (pre-inquiry) contract can validly destroy the privilege (not to give oral self-incriminating testimony) when asserted by a witness in response to questions during a proceeding, if that privilege would otherwise apply.

No case relating to bail sureties, or other persons, has been cited by my colleagues in support of their position. Nothing in any of the previous decisions relative to this Bail Fund bears on the subject.[1] My colleagues' ruling is a startling innovation; it marks the deepest inroad on the privilege to this date. In this particular case, the ruling may seem to have relatively little consequence; for, even if my view prevailed, it would mean only that the defendants would be entitled to urge the trial judge to use his discretion to reduce their sentences.[2] When, how-

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[1] Judge Swan, in *United States* v. *Field*, 2 Cir., 190 F. 2d 554, based his denial of bail solely on the refusal to turn over the books and records. Judge L. Hand followed Judge Swan, *United States* v. *Hunton et al.*, 2 Cir., 190 F. 2d 556. Justice Reed did the same. In *U. S.* v. *Flynn*, 190 F. (2d) 672 (C. A. 2), we did not have before us the issue of jailing the Bail Fund Trustees for contempt.

[2] That is, to reduce the sentences to the extent that he imposed them for refusal to answer the questions here being discussed.

Field's sentence has already run. Because of *St. Pierre* v. *United States*, 319 U. S. 41, I doubt whether we may pass on his conviction, since the appeal seems to be moot, although I find it somewhat difficult to reconcile *St. Pierre* with *Southern Pac. Terminal Co.* v. *I. C. C.*, 219 U. S. 498.

ever, the defendants have served their sentences, they may again be asked the same questions and again be held in contempt, if they repeat their refusals to answer. Moreover, the majority ruling on this point may have wide precedential consequences. All this explains why I shall spell out my reasons for disagreeing on this issue.

I think that, as I shall try to show, my colleagues have erroneously applied (1) cases admittedly having nothing to do with oral testimony, and (2) cases holding that civil remedies (*i.e.*, remedies other than criminal punishment) may be used, where one who asserts the privilege thereby breaks an obligation, voluntarily assumed, to testify orally.

I begin with the latest federal case on which my colleagues rely, *Shapiro* v. *United States,* 335 U. S. 1. I think that it plainly demonstrates that an advance voluntary assumption of an obligation to testify orally does not destroy the privilege. In the *Shapiro* case the Court was construing an OPA statute which required those engaged in a business regulated by that Act both (a) to make and keep records open to inspection and subject to subpoena and (b) to "appear and testify" orally under oath at administrative inquiries. The Court held that the defendant, by engaging voluntarily in such a business, assumed the obligation of compliance with these requirements. It also held that the statute made "public records" of the required records; that therefore the defendant had no constitutional privilege with respect to their production; and that, accordingly, on compulsorily producing them, he was not entitled to immunity from prosecution on the basis of the facts disclosed therein, despite the statutory immunity provision in § 202(g) of the OPA statute. The immunity thus conferred, said the Court, was only "co-terminous with what otherwise would have been the constitutional privilege." But, significantly, the Court carefully differentiated the lack of effect on the privilege of the obligation to testify assumed by the defendant. The Court said (335 U. S. 1 at 27), "Of course all *oral* testimony can properly

be compelled only by exchange of immunity for waiver of privilege." [3]

To summarize: The defendant Shapiro took on two obligations—(1) to keep and produce records and (2) to testify orally. The first was not at odds with the privilege, because the records had been made "public records." But the Supreme Court said that the second was within the privilege, which means that the privilege not to testify orally could not be destroyed by Shapiro's previous voluntary assumption of an obligation so to testify. As a result, Shapiro could have been compelled to testify orally as to matters tending to self-incrimination only because of the correlative statutory grant of immunity. But, in the case on appeal before us here, as there was no grant of immunity to the defendants, their privilege remained, notwithstanding their implied promise to make disclosure.

The distinction, laid down in the *Shapiro* case, between production of required records and compulsion of oral testimony has been reaffirmed in our own court: "We recognize that if Daisart had been required to submit reports pursuant to OPA's record-keeping requirements, then Smith could not claim immunity if compelled to produce them. *Shapiro* v. *United States,* 68 S. Ct. 1375. We think, though, the production of records must be distinguished from oral testimony as to what the records would contain, had they had been produced. * * * [T]he very matter that would incriminate had to be forced from the lips of the defendant himself, rather than obtained from the records or books." *United States* v. *Daisart Sportswear,* 2 Cir., 169 F. 2d 856, 862, reversed on other grounds, *Smith* v. *United States,* 337 U. S. 137.

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[3] Emphasis as in original.

Frankfurter, *J.*, dissenting in *Shapiro* v. *United States* (335 U. S. at 42), confirmed the distinction. "The Court supports * * * the 'short answer' that the immunity provided does cover compliance with any of those requirements as to which a person would have been excused from compliance because of his constitutional privilege. * * * Plainly the Court construes § 202(g) as according immunity only to oral testimony under oath."

My colleagues in now wiping out this distinction rely on (1) state court cases which, like the *Shapiro* case, sustained, as valid, in the face of the privilege, statutes requiring druggists or others to keep records open to public or official inspection and to produce them in court,[4] or (2) cases requiring certain kinds of oral reports to be made to the police.[5] But in these cases the state courts themselves have carefully pointed out, as a basis of sustaining those statutes, that the statutes made no attempt to compel the reporter, against an assertion of his privilege, to testify in court as to the contents of such reports.[6]

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[4] See, *e.g., State* v. *Davis,* 108 Mo. 666, 18 S. W. 894; *People* v. *Henwood,* 123 Mich. 317, 82 N. W. 70.

[5] See, *e.g., Ex parte Kneedler,* 243 Mo. 632, 147 S. W. 983; *People* v. *Rosenheimer,* 209 N. Y. 115, 102 N. E. 530.

[6] "The statute is a simple police regulation. * * * It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding." *Ex parte Kneedler, supra* note 5, 243 Mo. at 639. "I might hesitate * * * in upholding a statute which required the operator of a vehicle to appear and be examined as a witness on the trial of a criminal prosecution against himself for his conduct in the occurrence." *People* v. *Rosenheimer, supra* note 5, 209 N. Y. at 122. See also *People* v. *Creeden,* 281 N. Y. 413, 24 N. E. 2d 105, 107; *Bowles* v. *Amato,* D. C. Colo., 60 F. Supp. 361, 363.

It is worth noting that many of the state reporting statutes, like the ones above, have been upheld on the ground that the scanty and non-incriminating nature of the information required, *i.e.,* driver's identity and license number, constituted no real threat to the informer. See *Ex parte Kneedler, supra,* note 5, 243 Mo. at 639; *Commonwealth* v. *Joyce,* Mass. , 97 N. E. 2d 192, 194; *State* v. *Davis, supra,* note 4, 108 Mo. at 671. See *Mason* v. *United States,* 244 U. S. 362, the privilege does not extend to answers to questions too remote and unsubstantial; *Swingle* v. *United States,* 10 Cir., 151 F. 2d 512, compulsory identification alone does not violate the privilege. A statute requiring a "full report" to a police officer of details of motor accidents has been held unconstitutional. *Rembrandt* v. *Cleveland,* 28 Ohio App. 4, 161 N. E. 364.

There is an important practical difference between these reporting statutes, even those carrying criminal penalties for failure to keep such reports, and the abrogation of the privilege as to oral testimony. A man can be sent to jail only once for failure to keep certain

I think that not the slightest intimation in those cases justifies my colleagues' interpretation of them as holding that one required by statute to make such reports loses his privilege, in a judicial inquiry to which the contents of the report are relevant, to refuse to give self-incriminating oral testimony. Such a result is, I believe, without precedent in this country. The Supreme Court, in fact, took all these state court reporting statutes into consideration in *Shapiro* v. *United States,* 335 U. S. 1, 18.[7] Yet it was adamant in insisting that the privilege still applied to all oral testimony.

My colleagues consider it an "anomaly" to differentiate the production of documents from "questions concerning their contents." Even had the questions asked of the defendants here been thus restricted, I would not regard the distinction as anomalous; more to the point, the Supreme Court does not. But whatever there may be of anomaly in applying the privilege to questions concerning the books' contents vanishes with respect to the questions asked here which were utterly unrelated to these contents, *i.e.,* questions about when the defendants had last seen the fugitives, and the like.

My colleagues do not cite, and I have been unable to discover, a single American case deciding that a statute can validly abolish the privilege with respect to giving oral testimony. Moreover, in the instant case no statute required the defendants to report or make disclosures. Their obligation to disclose is wholly contractual, deriving by implication from their contract as sureties. No American case has been cited, and I can find none, to

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records. But he can be imprisoned as many different times in as many different proceedings as he is asked questions about those reports, if he has no privilege as to their contents.

See *United States* v. *Sullivan,* 274 U. S. 259, to the effect that perhaps it may not be a violation of a record-keeping or report-making statute to exclude from the record or report any statements tending to self-incrimination.

[7] See also Frankfurter, *J.,* dissenting at 59-65.

the effect that, by any advance contractual promise, the privilege can be abrogated. All the pertinent decisions hold the other way. Consider the case of a fiduciary. He patently owes an obligation, assumed when he becomes a fiduciary—an obligation which is at least as important as if embodied in an express contractual promise—to disclose to his beneficiary all dealings with the beneficiary's money or other property. Yet when a beneficiary has sued his fiduciary, it has been uniformly held in this country that the fiduciary may refuse to give self-incriminating oral testimony about such dealings, although the result may be seriously to impede or frustrate the obligation he unquestionably undertook voluntarily. See, *e.g., Ex parte Berman,* 105 Cal. App. 37, 287, P. 125; *Vineland* v. *Maretti,* 93 N. J. Eq. 513, 117 A. 48; *Warren* v. *Holbrook,* 95 Mich. 185, 54 N. W. 712. (The inapplicability in these United States of the English case of *Green* v. *Weaver,* 1 Sim., Ch., 404, cited by my colleagues, is explained in *Ex parte Berman, supra.*)

Very much in point are the cases relative to policemen and other public officers, for they involve contractual obligations owed to a government. A policeman, when he takes office, contracts in the most solemn manner conceivable—as signalized by his oath of office—to aid in the detection and apprehension of criminals. His solemn promise obviously includes a promise to give information to the government about the deeds of suspected criminals. Yet the courts, whenever the issue has arisen, have said, with no exception, that such an officer, if called in an inquiry concerned with facts squarely within the scope of the officer's sworn official duty, may efficaciously assert the privilege. See *Christal* v. *Pol Com. of San Francisco,* 33 Cal. App. 2d 564, 92 P. 2d 416; *In re Lemon,* 15 Cal. App. 2d 82, 59 P. 2d 213; *Drury* v. *Hurley,* 402 Ill. 243, 83 N. E. 2d 575; *Scholl* v. *Bell,* 125 Ky. 750, 102 S. W. 248; *cf. Claiborne* v. *United States,* 8 Cir., 77 F. 2d 682, 690. The courts, in such cases, fully acknowledging the official's obligation to testify orally, hold that the remedy

for the breach is not criminal punishment, but removal from office. "We are not unmindful of the constitutional privilege * * * which may be exercised by all persons, including police officers, in any proceeding, civil or criminal [citations]. As we view the situation when pertinent questions were propounded to appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. *Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege but the exercise of such privilege was wholly inconsistent with their duty as police officers.* They claim they had a constitutional right not to answer under the circumstances, but *they had no constitutional right to remain police officers* in the face of their clear violation of the duty imposed upon them." *Christal* v. *Pol. Com. of San Francisco, supra.*[8]

Suppose a policeman who had been assigned to arresting the Dennis-case fugitive Thompson had been asked, just as one of the defendants here was asked: "When did you last see Thompson?" Suppose the officer, on the basis of the privilege, had refused to answer. The precedents all teach that he could not have been adjudged in contempt.

In short, on the assertion of the privilege, the courts will not use criminal punishment as a means of compelling specific performance of a policeman's contractual obligation, but will approve other remedies for the policeman's breach of that obligation. So here: The defendants, because they have broken their contractual disclosure-obligation, may be rejected as sureties in future cases. *Concord Casualty and Surety Co.* v. *United States,* 69 F. (2d) 78, 81 (C. A. 2); *United States* v. *Lee,* D. C. S. D. Ohio, 170 F. 613; *United States* v. *Flynn,* 190 F. (2d) 672 (C. A. 2). And if money damages can be proved, they can be held civilly liable. But I think that, no more than the privilege-asserting policeman, can they be jailed or fined for the breach.

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[8] Emphasis added.

My colleagues, I think, betray the weakness of their position by citing, as "apposite," *Canteline* v. *McClellan*, 282 N. Y. 166, 25 N. E. (2d) 972. Was anyone there held in contempt for refusal to answer questions? Not at all. The court there quoted with approval the passage from the *Christal* case which I quoted above. That alone should serve to show how inapposite is *Canteline*. But we have better proof of its irrelevance: There was before the court in that case an amendment to the New York constitution which, so far as New York proceedings were concerned, could have wiped out the privilege for public officials, or, indeed, for everyone. But that amendment did not modify the privilege; it did not provide that an official could be jailed if he refused to answer self-incriminating questions; it provided merely that an official exercising the privilege should lose his office.[9] In *Canteline*, the court applied that amendment.

The weakness of my colleagues' position further appears from their citation of *Hickman* v. *London Assur. Corp.*, 184 Cal. 524, 195 P. 45, and *Swedish-American Tel. Co.* v. *Fidelity & Casualty Co.*, 208 Ill. 562, 70 N. E. 768. In the *Hickman* case, the plaintiff, insured by the defendant, agreed in this policy to submit to an examination under oath in matters concerning the loss. Plaintiff brought suit on the policy, although, setting up his privilege, he had previously refused to disclose the required information to defendant. The court found that, as he had breached it, he could not recover on the policy. The court did not, however, attempt, by punishing the plaintiff, to coerce him into

[9] This new provision of the New York State constitution was adopted in 1938, six years after Judge Seabury's speech (cited by my colleagues) advocating express relinquishment of the privilege by public officials as a condition of taking office. It illustrates the reluctance of the states, even by constitutional amendment, to abrogate the privilege for any class of citizens.

Yet New York has always required public officials to turn over public records in their custody. *People* v. *Coombs*, 158 N. Y. 532, 53 N. E. 527. The New York courts apparently see no "anomaly" in this distinction.

specifically performing his contractual promise. The *Swedish-American Tel. Co.* case seems singularly inapposite, since it did not in any way involve the privilege against self-incrimination. In that case, the defendant company, insured by the plaintiff, had agreed that, in order to enable the plaintiff to check on the premiums earned, the defendant's books should be open to inspection by the plaintiff. In a suit, about the premiums, brought by the plaintiff, the court ordered defendant to produce for plaintiff's inspection the pertinent books of the defendant. The company was fined for civil contempt when it refused. It asserted that the discovery order was an unreasonable search and seizure. The Supreme Court of Illinois held that it was not. Nothing in that case relates to oral testimony.

All the precedents say that the self-incrimination privilege relative to oral testimony cannot be abolished constitutionally by advance contracts between private persons or even between a government and its crime-detecting officials. My colleagues are either ignoring those precedents or announcing a new doctrine which, for these purposes, puts contracts between governments and bail-sureties in a special class. But why such a special class? Why should a policeman, suspected of conspiracy with criminals whom he owes a duty to detect and arrest, have the benefit of the privilege despite his contractual duty, while a private bail-surety does not, although the harm such a surety, if allowed to keep silent, does to society and public morals is far less grave than that done by such a silent policeman? The fact that a policeman wears a uniform, advertising his status as a public servant, certainly does not mean that discharge of his obligation—a part of his "due performance of accepted office"—is not at least as "close and direct" as that of a private citizen acting as a surety. Nor is the surety's assumption of his obligation one iota more "voluntary" than is that of a policeman. In truth, one might plausibly argue that, in a practical sense, the surety's is less "voluntary"; for every man entering the police force thoroughly

understands—more, he is told at length—that he is agreeing to detect and disclose crimes, whereas the implied disclosure-obligation of a private bail-surety is not generally well understood.

Since then, my colleagues' decision cannot reasonably rest on the notion of a special class, it must be taken as overruling the precedents, *i.e.*, as holding that any advance contractual promise inconsistent with the exercise of the privilege extinguishes the privilege. If my colleagues' remarks about the need for a "close and direct" relation between promise and privilege leave any lingering doubts on this score, those doubts can be easily dispelled in this way: insert in a contract an express provision that one of the parties promises to divulge, to the other, information of a designated kind, and that the promisor surrenders his privilege with reference to oral testimony in so far as it would interfere with performance of that promise. Then, presto chango, up the chimney goes the privilege. Thus, if my colleagues' decision is generally accepted, the sole practical effect of the constitutional privilege will be to add a few words to a contract. So the high hopes of Madison and his fellows, expressed in this Fifth Amendment privilege, will end up in a rubber-stamp contractual clause. Especially will all government employees be stripped of the privilege—by contract. Before long, rubber-stamped out of existence, the privilege will be but a quaint item of antiquarian lore.

At any rate, my colleagues are today ruling that, by a contract with the government, any man can validly surrender that constitutional privilege long before there arises a judicial inquiry in which he is asked to give self-incriminating oral testimony under oath. I regard that ruling as at odds with the rationale of Supreme Court decisions in respect of other constitutional privileges.[10] Thus, for

[10] *Johnson* v. *Zerbst*, 304 U. S. 458; *Von Moltke* v. *Gillies*, 332 U. S. 708; *United States* v. *Glasser*, 315 U. S. 60; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269.

example, no one thinks an official or private person can validly contract away his right to trial by jury in any or all future criminal proceedings; he can, however, waive that right after indictment if then fully aware of what he is doing.[11] Advance abandonment is forbidden to prevent the right being thoughtlessly foregone. And, for like reasons, the same rule governs the advance abandonment of the privilege against oral testimony which tends to incriminate. Nevertheless, it might be suggested that, since the privilege is personal and may be relinquished by not asserting it when one is judicially questioned, it must be capable of disposition by a contract made long in advance of the questioning. The answer is that the courts hold that, because of public policy considerations, many important rights or privileges cannot be bartered away before the happening of events calling them into operation, but may be abandoned after such happening. "A promise not to plead the statute of limitations as a defense, or a promise to 'waive' the benefit of it, has generally been held to be contrary to the public interest if it is made at the time of the contract the enforcement of which is involved"; but such a promise "is valid if made after the accrual of the cause of action to be affected by it."[12] "A contractor cannot in advance bargain away such defenses as fraud and duress, and yet he can * * * validate a previous bargain that was induced by fraud or duress."[13] So with the disposition of a mortgagor's "equity of redemption."[14] Similarly, a worker cannot, in advance of their accrual, "contract out" his rights under a workmen's compensation

[11] *United States* v. *Patton,* 281 U. S. 276, 312, 313.

[12] Corbin, Contracts §§ 218, 1515 (1950). *Cf.* as to discharge in bankruptcy, *Federal Nat. Bank* v. *Koffel,* 253 Mass. 157, 148 N. E. 379.

[13] Corbin, Contracts § 1515 (1950).

[14] *Ibid.*

statute.[15] A licensee under a patent may not lawfully agree in advance not to plead the invalidity of any patent if sued for infringement.[16] A provision of a contract is invalid by which one party agrees not to bring suit in or remove a suit to a federal court, although the right thus to sue or remove may be abandoned lawfully when the cause of action arises.[17] In the same way, to this extent, the self-incrimination privilege is inalienable—not to be yielded up—in advance.[18]

It seems to me that my colleagues have forgotten or have undervalued the stirring words uttered by the Supreme Court years ago: "* * * [A]ny compulsory discovery by extorting the party's oath, * * * to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. * * * [I]t is abhorrent to the instincts of

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[15] See, *e.g.*, *Red Rover Copper Co.* v. *Industrial Commission*, 58 Ariz. 203, 215, 118 P. 2d 1102; *Wass* v. *Bracker Construction Co.*, 185 Minn. 70, 240 N. W. 464.

[16] *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224. The Court there quoted with approval as follows from *Crane* v. *French*, 38 Miss. 503: "But there appears to be a clear distinction between declining to take advantage of a privilege which the law allows to a party, and binding himself by a contract that he will not avail himself of a right which the law has allowed him on grounds of public policy. A man may decline to set up the defense of usury, or the statute of limitations, or failure of consideration, to an action on a promissory note. But it would scarcely be contended that a stipulation inserted in such a note, that he would never set up the defense, would debar him of the defense if he thought fit to make it." See also *Nachman Spring-Filled Corp.* v. *Kay Mfg. Co.*, 2 Cir., 139 F. 2d 781.

[17] *Insurance Co.* v. *Morse*, 20 Wall. 445. See Corbin, *op cit. supra* note 12, § 1445. Restatement, Contracts § 558 (1932).

[18] See *In re Sales*, 134 Cal. App. 54, 59, 24 P. 2d 916, where the court refused to find petitioners in contempt for asserting their privilege in violation of an agreement made with the district attorney to repeat at trial testimony given before the grand jury: "* * * there can be no contractual relationships with the witnesses * * * any agreement attempted to be made by him [the witness] as to whether or not he would testify would be wholly void and no rights whatever would be cretaed thereunder."

an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd* v. *United States,* 116 U. S. 616, 631, 632. Perhaps I am too old-fashioned, but I confess to being thrilled by those words. If we take them lightly, if by one after another encroachment we keep diminishing this constitutional privilege, a bit here and a bit there, I fear that we are likely to move rapidly, although unwittingly, in the direction of the unfree, authoritarian, kind of government whose principles have long seemed unprincipled to Americans. Eastern European history is proving once more the value of this privilege—proving that a law-enforcement system habitually trusting to compulsory self-incriminating disclosures cannot long escape recourse to bullying and torture.[19] It is noteworthy, too, that those American officials who, deplorably, use the brutalitarian Third Degree manifest unusually strong hostility to this privilege.[20] So that if, at times, this privilege protects the guilty, yet often it serves as a shield to the innocent.[21] I think my colleagues have left little of that shield.

To be sure, some persons—Wigmore is typical [22]—who are by no means brutalitarian look upon the privilege as largely one which fosters foolish sentimentality towards criminals, and wish that it were not incorporated in the Constitution. But even if that wish were warranted (which I gravely doubt) the way to realize it would be by amending the Constitution, not by judicial decisions which erase it.[23]

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[19] A wag, after reading that terrifying book "1984," might say that, if we do not watch out, we will find truth at the bottom of an Orwell.

[20] *In re Fried,* 2 Cir., 161 F. 2d 453, 459, 460.

[21] 49 Yale L. J. 1059, 1078 (1940); *People ex rel. Taylor* v. *Forbes,* 143 N. Y. 219, 38 N. E. 303.

[22] 8 Wigmore on Evidence 318, 319 (3d Ed. 1940).

[23] See *United States* v. *St. Pierre,* 2 Cir., 132 F. 2d 837, at 847, 850 (dissenting opinion), cert. granted *St. Pierre* v. *United States,* 318 U. S. 751, but case dismissed as moot, 319 U. S. 41.

R 17-18 # 1-20

227-8 Questions at 179-183

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

FREDERICK V. FIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion in the Court of Appeals (R. 118-121) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1951. (R. 122.) The petition for the writ of certiorari was filed on November 21, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether an admitted trustee of a bail fund could interpose the privilege of self-incrimination when ordered to produce the records of the fund and to answer questions auxiliary to that production.

2. Whether a direction to a trustee to produce all the books and records of a bail fund was so broad as to constitute a violation of the fund's privilege to be free of unreasonable search and seizure.

STATEMENT

Petitioner was tried for contempt of court for refusing to produce before a grand jury of the Southern District of New York certain

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books and records and to answer certain questions relating to the Bail Fund of the Civil Rights Congress of New York. He was found guilty and sentenced to six months' imprisonment unless he should sooner purge himself, the sentence to commence at the termination of an earlier sentence of 90 days' imprisonment imposed July 5, 1951. (R. 3-4.) On appeal, the judgment was unanimously affirmed. (R. 122.)

This conviction grew out of a grand jury investigation into the failure of four of the defendants in United States v. Dennis, et al. to appear for service of their sentence after this Court had affirmed their convictions. 341 U.S. 494. Bail for the missing defendants had been posted by the Bail Fund of the Civil Rights Congress of New York. Petitioner was one of the five trustees of the fund. (R. 7-8.)

Before the grand jury, petitioner was asked numerous questions concerning the fund which he refused to answer on the ground of his privilege against self-incrimination. Samples of the questions follow:

> The offices of the bail fund are at 23 West 26th Street; is that right? (R. 21.)
>
> You have already testified, both before Judge Ryan and here, regarding the fact that you are a trustee of the bail fund. Is that not so? (R. 22.)
>
> Mr. Field, it is the fact, is it not, that you entered into the execution of various instruments which are on file with the clerk of the United States District Court, representing the bail documents of the defendants Hall, Thompson, Green and Winston? (R. 23.)
>
> Are you and have you been a trustee of that bail fund? (R. 24.)
>
> How voluminous are the records of the bail fund Mr. Field? (R. 25.)
>
> Are you one of those who participated in the conduct of the bail fund as its affairs are related to the posting of bonds for four fugitives -- Thompson, Green, Winston and Hall? (R. 26.)

He was also directed by the foreman of the grand jury to produce the records of the Bail Fund of the Civil Rights Congress of New York and refused on the same grounds (R. 16-17).

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However, during the course of the examination before the grand jury, petitioner did answer the following series of questions:

> Q. Mr. Field, who is the attorney for the bail fund? A. Mrs. Kaufman, Mrs. Mary Kaufman.
>
> * * *
>
> Q. At whose suggestion was she retained? What were the circumstances for retaining her? A. I believe Mrs. Kaufman was brought in as a result of a discussion among the trustees.
>
> Q. Which trustees? A. Well, this--I was trying to think back. Certainly Mr. Green and I participated. (R. 46.)
>
> * * *
>
> Q. Let's put it this way: Do you remember the first day that you conferred with--the first day that you discussed with anybody the question of retaining her? A. No, I don't think I do, very clearly.
>
> Q. Was that at about the time that the most recent crop of defendants were brought before Judge Kaufman on the question of their bail? A. Let me answer as accurately as I can remember. As I recall, I believe she was brought in--we brought her in at the time that your office questioned again the validity of the bail which the trustees were endeavoring to post. I'm not perfectly certain that this is correct, but that's the best recollection that I have at the moment.
>
> Q. Was there ever a time that Green talked to you about retaining her or you talked to him about retaining her? A. Well, I said, before, Mr. Saypol, that I think my recollection is, well, it must have been so; that the trustees, the available trustees, discussed this question. (R. 51.)

On July 25, 1951, petitioner was brought before the trial court which ruled that the privilege was not claimed by petitioner in good faith and as claimed did not exist. The court gave the following directions:

> Accordingly, I direct you to return before the Grand Jury and answer the questions with respect to the books and records and other matters concerning this bail fund, concerning which you have refused to answer questions.
>
> * * *
>
> When you are asked questions about how the bail fund was conducted and where the records are and what records were kept, and who kept them, and who attended any conferences with respect to that, those matters you are to answer.
>
> * * *

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Mr. Rabinowitz: Very well. I assume that with respect to the specific questions we can have further consideration, if it is necessary.

The Court: Not specific questions on these matters that I have just mentioned; the other trustees, how the fund was handled, what the records were, how they were kept, who had them, who attended meetings with respect to them, on those matters there is no necessity of running out and asking counsel each time one of those questions is asked. I say that with respect to them he has no privilege.

An hour later on the same day, petitioner was recalled as a witness before the grand jury. He refused to answer "countless questions," regarding the fund, its employees and the location of books and records of the fund. He refused to comply with instructions that he ask Abner Green, a co-trustee, or Miss Patterson, an employee of the fund, to produce the records. In all cases he claimed his privilege against self-incrimination. He again refused to answer whether he was a trustee of the fund, or whether he then or ever knew the location of the books and records of the bail fund.[1/]

Again on July 30, 1951, petitioner was recalled before the grand jury. He again refused to produce the records or give information which would aid in their production, as follows (R. 92):

Q. What is your position today with respect to those questions which have been propounded to you by the grand jury in regard to producing the books and records of the Bail Fund? A. Mr. Saypol, I have to stand by my previous position and decline to produce them on the grounds to do so might tend to incriminate me.

Q. In other words, your position is that you will give this jury absolutely no information or make any effort to produce the books and records, asserting this privilege? A. That's correct.

1/ (R. 13-14: - these facts are taken from the affidavit of the United States Attorney in support of the order to show cause, since they are not set forth in the record itself. See in this connection the stipulation at R. 116-117.)

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ARGUMENT

1. It is clear that petitioner admitted that he was a trustee of the bail fund. During the course of his answers to a series of questions (R. 46-47, 50-51) he stated that a Mrs. Mary Kaufman was the attorney for the fund, that he did not know exactly when she became attorney, that he would "have to look that up," and "that she was brought in as a result of a discussion among the trustees." He was then asked: "Which trustees?" He answered: "Well this -- I was trying to think back. Certainly Mr. Green and I participated."

Read with the answers to the remaining questions, there can be no doubt that as the court below held, this was an admission of trusteeship. (R. 119.)[2/]

It follows, as the court below also held, that with that admission petitioner "was no longer in a position to argue that the act of producing the Fund's papers might in itself involve self-incrimination. As an admitted trustee, he together with the other trustees held these papers merely in a 'representative capacity' and could not interpose the personal privilege against self-incrimination, even though production of the papers might tend to incriminate * * * personally. Rogers v. United States, 340 U.S. 367, 372." (R. 120.) See also United States v. White 332 U.S. 694, 699. Petitioner was obliged to produce the records and his failure to do so justified his conviction for contempt.

Petitioner's argument that the doctrine of the White case is not applicable to a political organization is without merit. In Rogers v. United States, 340 U.S. 367, this Court stated that the same principle applied to a political organization. The doctrine does not rest on the character of the organization; it rests on the fact that the person called upon to produce the records is acting in a representative

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2/ In view of this admission, it is unnecessary to discuss whether petitioner relinquished his privilege either by signing bail documents, or by testifying in an earlier proceeding.

capacity. Petitioner, as trustee, was so acting.

Furthermore, he was obliged, as the court below unanimously agreed, to answer questions "auxiliary" to the production of the records. United States v. Austin-Bagley Corporation, 31 F. 2d 229, 233-234 (C.A. 2), certiorari denied, 279 U.S. 863. There were numerous questions auxiliary to the production of the records such as where the office of the fund was located and how voluminous the records were. Actually, the only types of questions petitioner was directed by the trial court to answer were "questions about how the bail fund was conducted and where the records are, and what records were kept, and who kept them, and who attended any conferences with respect to that" (R. 84).[3/]

2. Petitioner contends that the demand for the books and papers was so broad that it constituted an unlawful search and seizure. It should be noted initially that the demand was not as broad as petitioner implies. He suggests (Pet. 16), quoting his own argument before the trial court, that the demand was for "all the books and records of the Civil Rights Congress." This is not true, as the petitioner admitted later during the same remarks when he stated: "If at any time I said the Civil Rights Congress, I meant the Bail Fund." (R. 101.)

From its title, it would appear that the fund was created for the specific purpose of furnishing bail in particular types of cases. Examination of the records of an organization created for so limited a purpose obviously could not be a general fishing expedition not pertinent to the inquiry. The very purpose of the organization was directly pertinent to the matter at issue.

Moreover, petitioner, an admitted trustee, failed to cooperate in any way which could have made it possible for the grand jury to limit its demand. See United States v. Fleischman, 339 U.S. 349, 356-358. Instead, he refused to state how voluminous the records were (R. 24); in fact, he refused to answer "any questions relating to the bail fund." (R. 24.)

3/ In view of this specific direction, petitioner's attempt to rely on Judge Frank's dissent in No. 440 is unwarranted since that dissent related only to other types of questions. It is clear that the basis of petitioner's conviction is his refusal to produce records and to answer auxiliary questions relating to the records.

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Under these circumstances, the grand jury had to demand all the records to determine the specific ones which it needed.

Petitioner refused to produce the records on Fifth Amendment, not Fourth Amendment, grounds. He raised his own personal privilege, not the privilege of the fund. (R. 16-17, 92.) The presence of the Fourth Amendment objection was an afterthought raised only after the direction and refusal to comply.

As was suggested by the court below (R. 120), there is thus nothing here to show that the fund's privilege as distinguished from Field's personal privilege was ever claimed. Certainly, petitioner's counsel made no attempt to enter an appearance either for petitioner as trustee (as distinguished from petitioner as an individual) or for the fund.

CONCLUSION

The judgment below is clearly correct; no conflict of decisions or questions warranting review of this Court are presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. McINERNEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
REX A. COLLINGS, JR.,
Attorneys.

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